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*In the*
*Supreme Court of the United States*

INTERNATIONAL BOUNDARY COMMISSION (U.S. SECTION), A UNITED STATES AGENCY; DENNIS SCHORNACK, IN HIS OFFICIAL CAPACITY AS UNITED STATES INTERNATIONAL BOUNDARY COMMISSIONER,

*Petitioners*,

v.

SHIRLEY-ANN AND HERBERT LEU,

*Respondents*.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The President of the United States purported to remove from office the Commissioner of an international organization who resisted litigation control by the Department of Justice. Contrary to more than seventy years of Supreme Court precedents, the Court of Appeals for the Ninth Circuit held that the Commissioner had no standing to challenge his removal because, it said, there was no possible redress in the absence of a high-ranking executive branch official as a party to the case. Must a high-ranking executive branch official be a party, for redressability, when another party challenges presidential powers of removal from office?

2. Contrary to decisions in other Circuits, the Court of Appeals for the Ninth Circuit ruled that the district court had no jurisdiction to choose among parties contesting to be the proper respondents to a lawsuit. Does a federal judge not have jurisdiction, when parties answering an ambiguous complaint disagree as to which of them is the party being sued and in order to manage the cases before her, to decide which party, pursuant to Rule 9(a) of the Federal Rules of Civil Procedure, is the correct party with the capacity to answer the complaint?

3. The Court of Appeals for the Ninth Circuit permitted the Department of Justice, even though it was not representing any federal party, to substitute a named defendant

according to Rule 25(d) of the Federal Rules of Civil Procedure, which is a federal rule applicable to federal parties. Can Rule 25(d) apply to substitute a defendant and enable Justice Department representation under 28 U.S.C. § 516 when the named defendant is not an officer of the United States and the organization sued is not an agency of the United States?

## PARTIES TO THE PROCEEDING BELOW

Herbert and Shirley-Ann Leu sued "The International Boundary Commission (U.S. Section) a United States agency," and "Dennis Schornack, in his official capacity as United States International Boundary Commissioner." The International Boundary Commission ("IBC"), an international treaty organization comprising two commissioners, one appointed by the President of the United States, the other appointed by Canada, was created by treaties ratified by the United States Senate in 1908 and 1925. Convention Between the United States and Great Britain Relating to the Canadian International Boundary, U.S.-Gr. Brit., Apr. 11, 1908, 35 Stat. 2003, Pet. App. D; Treaty Between the United States and Great Britain in Respect of Boundary Between the United States and Canada, U.S.-Gr. Brit., Feb. 24, 1925, 44 Stat. 2102, Pet. App. E.

The IBC, to the exclusion of all other agencies, organizations and authorities, is responsible for marking, mapping, and maintaining the border between Canada and the United States, settling all disputes as to the location of the border, and keeping clear a "boundary vista," ten feet to each side. The clear boundary vista provides access for U.S. Customs and Border Patrol and the Royal Canadian Mounted Police to police and patrol the border.

The 1908 and 1925 Treaties provide for presidential appointment of a commissioner, but with no specified term of office. The treaties are self-executing as no statute or other U.S. law provides for the appointment or removal of an IBC commissioner.

The first American served three different presidents over an eleven year period. Vacancies for commissioners appointed by the President can be filled, according to the plain language of the treaties, only upon the "death, resignation, or other disability" of a commissioner. The treaties confer no authority for the removal of a commissioner, nor for appointment of a commissioner or "acting commissioner" absent these conditions, and before President Bush's action in 2007, no President in American history had ever purported to remove the head of any international organization, including this one.

The IBC is deliberately technocratic. Its founding treaties, deriving from the Jay Treaty of 1794, 8 Stat. 116, and numerous other boundary treaties thereafter, specify that the commissioners should be experts and that they must mark, map, and maintain the border without political interference.

The Commissioner of the IBC, though appointed by the President, is not an officer of the United States because he is not appointed pursuant to a statute nor is he confirmed by the Senate. Instead, he is appointed by treaty as an official of an international organization. Dennis Schornack was appointed by President Bush to fill a vacancy created by resignation, consistent with the requirements of the treaties. President Bush purported to remove him, but without any authority to do so, and to replace him with an "Acting Commissioner" (David Bernhardt) whom he subsequently named "Commissioner," thus claiming to create a position

that does not exist in the law and had never previously existed ("Acting Commissioner"), and then to create and fill a vacancy for Commissioner that was not created by "death, resignation, or other disability."

Bernhardt purported to resign on Inauguration Day 2009, and to name Kyle Hipsley as his own replacement. The appellate court recognized Hipsley as the Acting Commissioner, even though he was not appointed by the President. The Ninth Circuit allowed Hipsley, the Acting Commissioner named by Bernhardt, who had no authority to name a successor, to defend the underlying lawsuit in an official capacity and on behalf of the IBC. The court made the determination that Hipsley could substitute for the named defendant while referencing Rule 25(d), but denied that it was making any determination as to whether Bernhardt had been appointed lawfully and without reference to any authority for Bernhardt to name Hipsley.

The Department of Justice ("DOJ") entered an appearance on behalf of the "federal defendants," invoking 28 U.S.C. § 516, but later conceded, consistent with a long history of opinions from the Department of State's Legal Adviser, that the IBC is an international organization and not an agency of the United States. DOJ has persisted in treating the IBC, despite this admission against claimed interest, as an agency of the United States with respect to its presumption in representing the IBC, trying to settle the legal dispute contrary to the IBC's mandate and interests, defending presidential authority to remove and replace the Commissioner.

Herbert and Shirley-Ann Leu brought the underlying suit, the first of its kind by Americans since the IBC was created in 1908. They did not appear at the oral argument in the Ninth Circuit, but made clear in the media their preference for an outcome that would recognize DOJ as counsel and Bernhardt and Hipsley as Commissioners because the Bush Administration attempted to enter a settlement with the Leus that would give them what they want: protection of a wall they built too close to the border in violation of the 1908 and 1925 treaties.

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Other Authorities

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## PETITION FOR A WRIT OF CERTIORARI

The International Boundary Commission and Commissioner Dennis Schornack respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the district court denying the motion of the International Boundary Commission and Commissioner Dennis Schornack for Relief is reported at *Leu v. International Boundary Commission*, 523 F. Supp. 2d 1199 (W.D. Wash. 2007) and is reproduced at Pet. App. B. The opinion of the Ninth Circuit is reported at *Leu v. International Boundary Commission*, 605 F.3d 693 (9th Cir. 2010) and is reproduced at Pet. App. A. The order of the Ninth Circuit denying the petitioners' motion for rehearing with a suggestion for rehearing *en banc* is reproduced at Pet. App. C.

## JURISDICTION

The judgment of the Ninth Circuit was entered on May 19, 2010. Pet. App. A. The petitioners filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The Ninth Circuit denied that petition on August 19, 2010. Pet. App. C. This petition is timely filed pursuant to Supreme Court Rule 13(1) and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Article II, Section 2, Clause 2 of the Constitution of the United States provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. 28 U.S.C. § 516, provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

3. Federal Rule of Civil Procedure 9(a), provides:

Capacity or Authority to Sue; Legal Existence.

(1) In General.
Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;
(B) a party's authority to sue or be sued in a representative capacity; or
(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues.
To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

4. Federal Rule of Civil Procedure 25(d), provides:

Public Officers; Death or Separation from Office.

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

The 1908 and 1925 Treaties are reprinted in the Appendix.

## STATEMENT OF THE CASE

### A. Factual Background.

The IBC Commissioners, from Canada and the United States, observed in 2007 that a couple in Blaine, Washington (the Læus), living adjacent to the U.S. border with Canada, had constructed a four-foot high, eighty-five foot long reinforced concrete wall within the boundary vista restricted by the international treaties. The two Commissioners, together and in person, advised the Læus that their wall intruded into the treaty-protected boundary vista and would have to be moved. The Læus refused and sued "The International Boundary Commission (U.S. Section) a United States agency," and "Dennis Schornack, in his official capacity as United States International Boundary Commissioner," asserting that the IBC's instructions to relocate the wall violated their rights under the Fourth and Fifth Amendments of the U.S. Constitution. Until the Læus filed their suit in early 2007, no American had sued the IBC since the treaty organization's creation. In all other instances of intrusion into the restricted boundary zone, whether deliberate or accidental, U.S. citizens had accepted the IBC's authority and complied with its requests.

The Læus captioned the case against "a United States agency" and the "United States International Boundary Commissioner" because they knew that their Fourth and Fifth Amendment claims would be dismissed if brought against an international organization and an international official. They

ignored the Commissioner appointed by Canada, notwithstanding that he, too, had informed them of their infraction and the necessary remedy.

The Department of Justice ("DOJ"), asserting plenary authority pursuant to 28 U.S.C. § 516, applicable only to U.S. agencies and U.S. government officials, entered an appearance in United States District Court for the Western District of Washington on behalf of "federal defendants." The IBC and the named commissioner, obliged by treaty to protect the IBC's integrity as an independent, binational organization, and acting on multiple advisories from the U.S. Department of State for more than fifty years that the IBC is not a federal agency, asked DOJ to correct its position and to move for dismissal on grounds that the Leus' "unlawful seizure" and "Takings Clause" claims were inapplicable to the IBC as an international organization, and to Commissioner Schornack, who could not be an officer of the United States according to the requirements of Article II, Section 2, Clause 2 of the Constitution of the United States. DOJ refused its clients' request to move for dismissal of the complaint, informed the IBC that it would have to subordinate its interests to other undefined interests of the United States to be determined by DOJ, and proceeded to consult with other U.S. agencies to the exclusion of the IBC.

The IBC and the Commissioner engaged their own counsel to file appearances because they were not "federal defendants;" no authority derived from 28 U.S.C. § 516 for DOJ to represent them; the Department of State had advised them to retain private counsel because the government could not

provide legal advice for the international treaties; DOJ had refused to represent the IBC's interests as articulated by the IBC; and DOJ had all but guaranteed it would miss the court deadline and default on the Complaint. DOJ threatened Commissioner Schornack that he would lose his job unless he dismissed IBC counsel and took instructions exclusively from DOJ. The Commissioners, defending the best interests and independence of the IBC, instructed their counsel to file a notice of appearance and a timely motion to dismiss the Leus' lawsuit, just before DOJ's thirty-day extension was to expire. DOJ had not planned to meet its second deadline to respond to the Complaint, preferring to seek a second extension as the first one was expiring.

Five days later, on July 10, 2007, President Bush purported to fire Commissioner Schornack and replace him with a compliant lawyer from the Department of the Interior. The firing presumed that the Commissioner was an officer of the United States, a U.S. government agency official in the presidential chain of command. The applicable treaties creating the IBC, however, provided for appointment only upon a commissioner's "death, resignation, or other disability" and established the IBC as an international treaty organization, not a federal entity.

The IBC asked the court, pursuant to Rule 9(a) of the Federal Rules of Civil Procedure, to decide who had the capacity to act as the defendants in the Leus' suit. The court concluded that it would recognize DOJ and "federal defendants," treating the

presidential action as a *fait accompli*, yet claimed not to be deciding whether the President lawfully could dismiss and replace the Commissioner; whether the IBC is a federal agency; and whether the Commissioner is an officer of the United States.

The Court of Appeals for the Ninth Circuit vacated the district court's ruling, asserting that the district court did not have jurisdiction to apply Rule 9(a) because Schornack had no standing to challenge his removal. He had no standing to challenge his removal, the court said, because he had been removed, and because there was no high ranking executive branch official party to the case for redressability: "Schornack has elected to contest the lawfulness of the President's attempt to remove him by filing motions in a suit in which no executive-branch official is a party. *Cf. Swan v. Clinton*, 100 F.3d 973, 979-81 (D.C. Cir. 1996) (concluding that an injunction against the President was unnecessary where enjoining 'subordinate officials . . . could substantially redress [the plaintiff 's] injury.')" The court went on, "We lack jurisdiction to review Schornack's non-redressable claim, whether presented under the collateral-order doctrine or through a petition for a writ of mandamus, and all claims here asserted by Schornack against the executive branch are dismissed." The court presumed that DOJ and a substituted "Acting Commissioner" represented the IBC, yet, the court concluded, "We express no view on the merits of the validity of President Bush's termination of Schornack's tenure as Commissioner of the International Boundary Commission." The court

said nothing about the standing of the IBC, which had also challenged the Commissioner's removal.

The court of appeals, thus, denied the district court authority to adjudicate the issue arising under Rule 9(a) on the grounds that no redress was available for the challenge to presidential removal. This decision on Rule 9(a) denied the authority of a district court to decide on the proper parties and hence to manage its own cases, contrary to decisions in other circuits. The decision as to redressability, the court's grounds for denying standing, is contrary to a long line of Supreme Court decisions.

B. Proceedings Below.

The Leus styled the complaint against "an agency of the United States" and "the United States Boundary Commissioner" because the IBC as an international organization would have been immune to their Fourth and Fifth Amendment claims, as would Schornack have been as "Commissioner." DOJ asserted an exclusive right to represent "federal defendants" but declined to move for dismissal of the lawsuit. DOJ would have defaulted in district court had outside counsel engaged by the IBC and Schornack not filed a timely motion to dismiss. DOJ subsequently attempted to settle with the Leus for more than the Leus wanted, to the detriment of border security and DOJ's supposed clients.

After the IBC moved to dismiss the Leus' suit, DOJ renewed its instruction for Schornack to dismiss outside counsel and accept DOJ as exclusive counsel for the IBC. DOJ advised that it was responsible for

interests other than those of the IBC and would favor those other still undefined interests. DOJ threatened that, were Schornack not to accept this instruction, it would arrange for the President to fire him. He refused to compromise the IBC; DOJ carried out its threat, the President purporting to dismiss Schornack without cause. DOJ also arranged for the President to appoint immediately a replacement, whose first acts were to seize control of the lawsuit, entering an appearance through substitution pursuant to Rule 25(d), and to order outside counsel, unilaterally and without consulting the other Commissioner (the treaties require all decisions of the IBC to be by consensus of the two Commissioners), to cease participation in the case.

The district court, noting DOJ's default and declining to accept immediately DOJ's assertion of representation, ordered DOJ to prepare, on behalf of U.S. government interests, an *amicus* brief for the motion to dismiss that had been filed by outside counsel. However, the court later ruled that, because the IBC Commissioner was not appointed for a specific term, he must be serving at will and at the pleasure of the President. The district court judge thus recognized the President's purported replacement and DOJ, yet also recognized that the plain language, object and purpose of the treaties and the history of the IBC were contrary to this conclusion. She subsequently certified an interlocutory appeal of Schornack's dismissal, which was deciding the parties, counsel, and likely outcome of the underlying case.

The Ninth Circuit heard an interlocutory appeal of the matter under the collateral order doctrine and vacated the decision of the lower court, stating that the Ninth Circuit could not redress the Schornack dismissal because no high-ranking executive branch official was party to the case, and that the lower court lacked jurisdiction to make any judgment about the President's authority to dismiss Schornack. The Ninth Circuit explained:

> Schornack asks us to hold that he was not lawfully terminated from his position and that Bernhardt was not lawfully appointed to replace him. We conclude, however, that we do not have jurisdiction to so hold because Schornack does not have Article III standing to seek this relief. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (holding that a party seeking relief "bears the burden of showing that he has standing for each type of relief sought").
>
> [1] To the extent that Schornack merely seeks to have President Bush's action in removing him declared unlawful, that is "not an acceptable Article III remedy." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (holding that "psychic satisfaction," seeing "that a wrongdoer gets his just deserts,"

> or ensuring that another is "punished for [his] infractions," are not cognizable Article III remedies); *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir. 2009) ("In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing.")

The Ninth Circuit denied petitions for rehearing and rehearing *en banc*.

Following receipt of a Mandate from the Ninth Circuit, the district court denied a motion filed by the IBC and Schornack to extend the court's stay pending this petition because, the court concluded, the IBC and Schornack had no standing to file the motion. Subsequently, the court granted a joint stipulation filed by the Leus and DOJ to dismiss the action in its entirety. The stipulation included acceptance of the settlement sought by these same parties on the eve of President Obama's inauguration, confirming construction of the intrusive wall and permitting the Leus to enlarge it. However, recognizing legal doubts, the agreement stated that "if a Court order dismissing the Litigation is later vacated and/or annulled, this Agreement shall be void."

The court order of November 2, 2010 dismissing the action described here is inherently defective. The identified representative of the IBC is "Acting United States Commissioner Kyle Hipsley," but there is no such position as "Acting United States

Commissioner" and Mr. Hipsley has no claim to such a position or any other that would empower him to enter a legal settlement on the IBC's behalf. Moreover, DOJ counsel, not Mr. Hipsley, signed the Agreement on behalf of the IBC, yet could represent according to 28 U.S.C. § 516 only interests of the United States, not the international organization.

The denials of standing by both the district and appellate courts have made it impossible for the lawfully appointed Commissioner and the IBC itself to challenge the order dismissing the action. Moreover, the court issued the order within twenty-four hours of the filing of the joint stipulation, permitting no possibility of challenge.

The district court's order of November 2, 2010 cannot render moot the issues raised in this petition because the petition arises under the collateral order doctrine, dealing with vital constitutional issues undecided by the orders of the district and appellate courts; because, were this Court to agree that the IBC's legally authorized representative is Commissioner Schornack, no authority exists for the execution of the stipulation and settlement forming the basis of the district court's dismissal; and, because procedurally the denial of standing prohibited all challenges but this one.

## REASONS FOR GRANTING THE PETITION

### A. More Than Seventy Years Of Supreme Court Precedent Establish That A High-Ranking Executive Branch Official Need Not Be A Party For Challenges To Presidential Authority

The Ninth Circuit denied Schornack standing to challenge his removal, ostensibly on the ground that the executive branch was not present in the case. That decision contravenes this Court's redressability cases and conflicts with the law of other circuits. Moreover, the logic of the opinion is inherently unsound and divorced from the facts.

For purposes of redressability, there are only two possibilities here: either the IBC is an agency of the United States and Hipsley is an executive branch employee who can provide relief (presumably appointed lawfully in accordance with the treaties) – meaning the appellate court could hear the matter, even on its own terms – or the IBC is not an agency of the United States, and Hipsley was assumed improperly by the Ninth Circuit to be a party defendant. Factually, therefore, the Ninth Circuit's opinion was divorced from this case, but if there were "federal defendants," the Ninth Circuit ruled contrary to other circuits and many earlier decisions of this Court.

The lower court's implicit conclusion that Schornack was lawfully removed required finding him in the President's chain of command as an officer of the United States. DOJ contradicted itself in

asking the appellate court to treat Hipsley as a lawful agency head (even asking the court, in a post-decision letter, to recognize Hipsley as the named appellee) while urging dismissal for want of a high-ranking official and conceding that the agency is not an agency of the United States.

The only reason even to think there is a need for representation of the executive branch in cases involving presidential authority is for some party to be able to carry out the court's order. In *Utah v. Evans*, 536 U.S. 452 (2002), this Court entered a declaratory judgment requiring an action of the President even though the President was not a party to that case. The Court held that standing to challenge government actions depends on "the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," not whether the President is a party, *id.* at 464, and found such relief possible because "it would seem, as in [*Franklin v. Massachusetts*, 505 U.S. 788 (1992)] 'substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation'" of the statute and laws in question. *Id.* at 463-64. There is no need for the President himself to be a party.

The Ninth Circuit's opinion directly conflicts with this Court's redressability decisions in *Evans*, 536 U.S. 452, and *Franklin*, 505 U.S. 788. It conflicts with decisions of other Circuits respecting redressability, as in *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001), and *Swan*, 100 F.3d 973, a case the Ninth Circuit quoted but misread.

Contrary to the Ninth Circuit's decision, the President need not be a named party, not even when appointees serve "during the pleasure" of the President. All the seminal removal decisions of this Court, including especially *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *Wiener v. United States*, 357 U.S. 349 (1958), *Morrison v. Olson*, 487 U.S. 654 (1988), and also *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Bowsher v. Synar*, 478 U.S. 714 (1986), instruct that a court decision is binding on the authority of the President to remove an official, and the authority can be challenged without the President or a high-ranking executive branch official being a named party. In none of these cases did this Court say there was no redressability because the President or a high-ranking official was not a party.

While ignoring the underlying facts of the presidential removal cases – that neither the President nor a high-ranking executive branch official was a party in any of them – the Ninth Circuit relied on misreadings of three more cases to support its conclusion. It failed to recognize that this Court, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), acknowledged that "standing is not precluded" in a matter requiring a non-party's action where the non-party's actions could be presumed. *Id.* at 562. According to *Evans* and *Franklin*, standing requires only a substantial likelihood that the President "would abide by an authoritative interpretation'" of the statute and laws in question, and presidential compliance may be presumed. *Evans*, 536 U.S. at 463-64; *Franklin*, 505 U.S. at 803.

The Ninth Circuit misconstrued the reason this Court found no standing in *Lujan*. Standing was denied not because plaintiffs' claims were not redressable, nor because the President was not a party, but because plaintiffs failed to show an injury in fact. *Lujan*, 504 U.S. at 567. This Court reasoned that it was highly speculative whether the plaintiffs would visit foreign countries where they would be deprived the enjoyment of wildlife. *Id.* at 564 n.2. *Lujan* does not support the appellate court's conclusion that redressability was impossible without the President or another "high-ranking executive branch official" as a party.

Unlike in *Lujan*, it is not speculative that Schornack would resume his duties as Commissioner and defend the IBC against the Læus' complaint if the courts would rule that he should do so. He was the only party present in the district court, and again at the Ninth Circuit hearing nearly three years later. Nor does it matter, for redressability, that he has served without pay: Schornack's appointment conferred upon him the authority and responsibility to defend the IBC. Redress follows the respect other government officials must give to a ruling of a federal court concerning the IBC.

The IBC and Schornack, contrary to the Ninth Circuit's assertion in its reference to *Summers*, 129 S.Ct. at 1149, satisfy the requirements and meet the burden of showing Article III standing. They were injured in fact by the President's unlawful removal. The consequence of declaratory relief would be more than the appellate court's belittling characterization of "psychic satisfaction" (relying on *Steel Co.*, 523

U.S. at 106-07, and *Fieger*, 553 F. 3d at 962). Relief would recognize the IBC's international status, provide the lower court proper defendants against pending claims, and protect an international organization against an over-reach of executive power, enabling the IBC to fulfill its treaty mandate and to preserve its integrity and independence, thus curing much more than the "psychic injury" to which the appellate court made reference.

The appellate court, relying on *Cohens v. Virginia*, 19 U.S. 264, 399-402 (1821), and *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968), said, "It is not permissible under Article III for us to give an essay-like lecture to the executive branch in a decision that will not bind it because it is not a party to this litigation." This Court was neither lecturing nor writing essays in the removal cases.

The Ninth Circuit ignored *Franklin v. Massachusetts*, where this Court was confident of redressability despite the absence of the President as a party, "either because the President would voluntarily abide by it or because the President had no choice but to abide by it." *Adams v. Clinton*, 90 F. Supp. 2d 35, 42-43 (D.D.C. 2000) (citing *Franklin*, 505 U.S. at 803 (finding it "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision")).

Although the President was named in *Adams*, redressability was found in an order to the Secretary of Commerce, who himself was not a named defendant. 90 F. Supp. 2d. at 44 ("when necessary to

satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order."). There are no such obstacles here. Hipsley is, according to DOJ and the appellate court, a named defendant from the executive branch and only he could frustrate implementation of a federal court's order.

The Eleventh Circuit concluded in *Made in the USA Foundation*, 242 F.3d at 1310-11, that "a judicial order instructing subordinate executive officials to cease their compliance with [NAFTA's] provisions would suffice for standing purposes." And according to the D.C. Circuit in *Swan v. Clinton*, standing is afforded as long as even "partial relief" is available from some subordinate to the President. 100 F.3d at 980-81. Hence, in addition to contradicting the relevant line of this Court's cases, the Ninth Circuit is at odds with decisions in at least two circuits.

As a factual matter, the Ninth Circuit was wrong. Having accepted Hipsley as the Acting Commissioner and an officer of the United States, the party the court said was missing was the named defendant. It is also oxymoronic to recognize DOJ, purporting to represent the interests of the United States and specifically the executive branch, as counsel, while concluding that the executive branch is absent from the case.

### B. A Federal District Court Can And Must Have Authority To Manage Cases Before It By Determining Who Are The Proper Parties

The Ninth Circuit presumed Bernhardt (and then Hipsley) to be the proper defendants, and DOJ to be counsel, based on the circular argument that, because Schornack had been removed (without judging, the appellate court claimed, the legality of the removal), he had no standing. The Ninth Circuit, thus, chose between the IBC and Schornack, on the one hand, and the "U.S. Section" of the IBC and Bernhardt, on the other, while instructing the district court that it had no jurisdiction to make such a choice. This irrationality is contrary to the plain meaning of Rule 9(a), and to judgments about that rule in other circuits.

Pursuant to Rule 9(a), a federal judge has jurisdiction to determine who has the capacity to sue and be sued. The ruling in the Ninth Circuit appealed here is contrary to the law of the Eighth, Second, and Sixth Circuits. *See Blackmar v. Lichtenstein*, 578 F.2d 1273, 1276 (8th Cir. 1978) ("[t]o presume real party in interest . . . is not to engage in that 'prudential exercise' of jurisdiction which the United States Supreme Court has recently required of federal courts."); *Winbourne v. Eastern Air Lines*, 632 F.2d 219, 224 (2d Cir. 1980) (capacity to sue must be resolved first); *Berndt v. State of Tenn.*, 796 F.2d 879, (6th Cir. 1986) (court enabled plaintiff to add defendants after identifying them as proper parties).

The dispute before the Court over the identification of proper parties is ultimately over the

dismissal of the presidentially-appointed head of an international organization. DOJ based its right to represent parties and to issue directives in this case on its claim that it represents a U.S. agency and a federal official, notwithstanding its own admission in opposing the petition for *en banc* hearing that the IBC is not a U.S. agency. Were DOJ to have acknowledged from the beginning that the IBC is an international organization and the Commissioner is not an officer of the United States, it perhaps would not have contested the IBC's appearance with its own counsel, nor sought the presidential removal of the Commissioner who refused to obey DOJ's edicts. Instead, DOJ forced these issues onto the district court.

The appellate court denied the district court's obligation and authority to engage, in the words of the Eighth Circuit, in the "'prudential exercise' of [its] jurisdiction." Schornack's invocation of Rule 9(a) was not to determine whether any personal rights or benefits accruing to him had been infringed, but rather to determine who had authority to speak and act on behalf of the IBC in litigation naming the IBC as a defendant. If the President were without authority to remove and replace the Commissioner, which both the district and the appellate courts said they were not deciding, then Schornack was the only proper spokesman for the IBC in the litigation. Claiming not to decide the question while asserting with consummate circularity that Schornack was removed because he was removed and was replaced because he was replaced decides the very question the appellate court claimed it and the district court had no jurisdiction to answer. In this case, DOJ

appeared claiming to represent "federal defendants," only later to admit that the IBC is not a federal agency.[1] Yet, the appellate court ruled that the district court could not even examine the question as to who were the proper parties.

Determination of proper parties can and must necessarily be decided by a court administering cases brought before it. The court must be able, pursuant to the Federal Rules of Civil Procedure, to prevent unauthorized persons from appearing and defrauding the court. There is an obvious and material difference between determining the party with authority to act on behalf of a named defendant, and determining whether someone denied such authority might have personal claims. Here, the appellate court ordered the district court to accept DOJ as counsel and Hipsley as the named defendant pursuant to Rule 25(d), effectively requiring recognition of the IBC as a federal agency even after DOJ had conceded it is not a federal agency, thereby stripping the district court of its essential case management obligations and the IBC of its rights to defend its interests.

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[1] DOJ could represent the interests of the United States in the case, as the district court had ordered when requiring an *amicus* brief for the motion to dismiss filed by the IBC's counsel. It could not, however, claim to be exclusive counsel for an international organization and, moreover, advise the organization that it would subordinate its interests.

### C. Rule 25(d) Of The Federal Rules Of Civil Procedure Applies Only To Federal Agencies And Officials And Cannot Resolve The Identity Of Parties In This Case

If the IBC were a federal agency and the Commissioner were an officer of the United States, the dispute over the Commissioner's removal would be redressable, whether Hipsley, as a party, were a high-ranking executive branch official, or whether, consistent with seventy years of Supreme Court jurisprudence, there was no high ranking executive branch official as a party to the proceedings and none was necessary. Alternatively, the IBC is an international organization as DOJ admits and as Hipsley himself acknowledged when he stated that the IBC is "a Treaty organization, not a federal agency." And the Commissioner cannot be an officer of the United States by reason of the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. Rule 25(d) then could not apply, substituting a federal defendant, when the organization at issue is not an agency of the United States. DOJ cannot assert exclusive representation on behalf of the treaty organization while it represents distinct interests of the federal government. The IBC Commissioner advised DOJ that the position it advocated was contrary to the IBC's interests.

The "removal" cases misconstrued by the court of appeals deal with officers of the United States. The IBC Commissioner is not, constitutionally, an officer of the United States. According to Article II, Section 2, Clause 2 of the Constitution, an officer of the United States must be appointed pursuant to a statute or be confirmed by the Senate. The IBC

Commissioner, appointed pursuant to the plain language of international treaties, is neither appointed pursuant to a statute, nor confirmed by the Senate. Consequently, he is not and cannot constitutionally be an officer of the United States.

Rule 25(d) cannot apply to the head of an international organization who is not an officer of the United States, and 28 U.S.C. § 516 confers no authority on DOJ when the defendants are not officers or agencies of the United States. The plain language of the rule, and of the statute, limits substitution to federal officers and agencies.

The Ninth Circuit accepted Hipsley as the named defendant in the underlying lawsuit and as an officer of the United States, yet Hipsley was not appointed, as required, by the President, nor appointed by statute, nor confirmed by the Senate. According to the Ninth Circuit, no one had standing to challenge the fraud on the court asserting DOJ's plenary authority to represent an institution it later admitted is not an agency of the United States, nor to challenge Hipsley's "appointment" by another official himself arguably not an official of the IBC nor holding any position with authority to appoint an international official. For the Ninth Circuit, mere invocation of Rule 25(d) was good enough and beyond challenge. The Ninth Circuit's acceptance of Rule 25(d), however, permanently impacts the status and character of the international treaty organization while unconstitutionally expanding presidential power and the scope of DOJ representation.

The courts cannot sanction DOJ's presumption that it can represent an international organization

and subordinate the organization's interests to other interests of the United States. DOJ cannot substitute one federal official for another as Commissioner of the IBC, pursuant to Rule 25(d), when the Commissioner is not a federal official. Judicial approval of this conduct is contrary to the plain language of the Federal Rules.

## CONCLUSION

For the foregoing reasons, the IBC respectfully requests that the Court grant the petition for a writ of certiorari and review the decision of the Court of Appeals for the Ninth Circuit in this matter.

Dated: November 8, 2010

Respectfully submitted,

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# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Docket No. 07-35949

Shirley Ann Leu; Herbert Leu, Plaintiffs-Appellees

v.

International Boundary Commission, et. al.,
Defendants-Appellants, Defendants-Appellees

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Argued: May 5, 2010
Decided: May 19, 2010

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Before: CYNTHIA HOLCOMB HALL, KIM McLANE WARDLAW and RONALD M. GOULD, Circuit Judges.

GOULD, Circuit Judge:

Dennis Schornack appeals the district court's order denying cross motions by Schornack and David Bernhardt in which each sought to have the other's filings quashed or struck from the case. The case arose out of a property dispute between Shirley-Ann and Herbert Leu and the International Boundary

Commission (IBC), an organization tasked with defining, marking, and maintaining the boundary between the United States and Canada. The IBC is composed of just two commissioners, one from each country. The Leus brought a takings claim against the IBC and the United States Commissioner-then Schornack-in his official capacity. While this suit was pending, President George W. Bush, who had appointed Schornack to the IBC in 2002, by letter explicitly purported to remove Schornack from his post and to install Bernhardt in his place. Schornack disagreed that the President could remove him and sought to quash Bernhardt's filings in the district court. Schornack's legal theory rested on the premise that the President had no power to fire Schornack or appoint Bernhardt under the terms of the treaties that created the IBC. *See* Treaty Between the United States and Great Britain in Respect of Boundary Between the United States and Canada, U.S.-Gr. Brit., Feb. 24, 1925, 44 Stat. 2102; Convention Between the United States and Great Britain Relating to the Canadian International Boundary, U.S.-Gr. Brit., Apr. 11, 1908, 35 Stat.2003. Schornack further argued that the Department of Justice had no business representing the IBC because the IBC is an international organization and not a United States agency. Bernhardt correspondingly asked the district court to strike all of Schornack's filings that were made through private counsel. The district court denied the motions to quash and strike, but held that Schornack had been "effectively removed" from the IBC, citing the President's powers under Article II of the Constitution and analyzing the treaties' language. Schornack appeals that order. The fundamental

underlying question is whether Schornack, who has received a termination letter from the President, can pursue this appeal on behalf of the IBC after the President has said he is no longer on that Commission.

Schornack concedes that his argument is in the nature of a request for declaratory relief. Schornack asks us to hold that he was not lawfully terminated from his position and that Bernhardt was not lawfully appointed to replace him. We conclude, however, that we do not have jurisdiction to so hold because Schornack does not have Article III standing to seek this relief. *See Summers v. Earth Island Inst.*, ··· U.S. ····, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009) (holding that a party seeking relief "bears the burden of showing that he has standing for each type of relief sought").

To the extent that Schornack merely seeks to have President Bush's action in removing him declared unlawful, that is "not an acceptable Article III remedy." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that "psychic satisfaction," seeing "that a wrongdoer gets his just deserts," or ensuring that another is "punished for [his] infractions," are not cognizable Article III remedies); *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir.2009) ("In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing.").

Schornack fares no better if he seeks a declaration that he was improperly removed along with an order

instructing current Acting Commissioner Kyle K. Hipsley to vacate the IBC offices and allow Schornack to resume the Commissioner's duties. Neither the President nor any high-ranking member of the executive branch is a party to this suit. Accordingly, any judgment entered in this case would not bind executive officials. *See* Restatement (Second) of Judgments §§ 34, 62 cmt. a (1982) ("It is a basic principle of law that a person who is not a party to an action is not bound by the judgment in that action."). Where requested relief "depends on the unfettered choices made by independent actors not before the courts"-here, the President's decision to voluntarily bind himself to an otherwise non-binding judgment-the claim is not redressable and this court lacks jurisdiction over it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). From the early days of our Republic, the Supreme Court has consistently held that federal courts are not here to give advisory opinions. *See, e.g., Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 399-402, 5 L.Ed. 257 (1821); *Flast v. Cohen*, 392 U.S. 83, 96-97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). It is not permissible under Article III for us to give an essay-like lecture to the executive branch in a decision that will not bind it because it is not a party to this litigation.

Without filing his own lawsuit, and while expressly disclaiming that he is seeking to make any personal claim, Schornack has elected to contest the lawfulness of the President's attempt to remove him by filing motions in a suit in which no executive-branch official is a party. *Cf. Swan v. Clinton*, 100 F.3d 973, 979-81 (D.C.Cir.1996) (concluding that an

injunction against the President was unnecessary where enjoining "subordinate officials ... could substantially redress [the plaintiff's] injury"). We lack jurisdiction to review Schornack's non-redressable claim, whether presented under the collateral-order doctrine or through a petition for a writ of mandamus, and all claims here asserted by Schornack against the executive branch are dismissed. We therefore vacate the district court's order and remand with instructions to grant the motion to strike filed by the Department of Justice with respect to all filings by Schornack on or after July 10, 2007. We express no view on the merits of the validity of President Bush's termination of Schornack's tenure as Commissioner of the International Boundary Commission. Each of the three parties shall bear its own costs.

VACATED and REMANDED.

# APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON

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Docket No. C07-510MJP

Shirley Ann Leu and Herbert Leu, Plaintiffs

v.

International Boundary Commission (U.S. Section), et al., Defendants

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Filed: October 12, 2007

## ORDER

MARSHA J. PECHMAN, District Judge.

In this case, about a concrete retaining wall built a few feet too close to the Canadian border, the Court is asked to decide whether the President of the United States has the authority to fire the United States Commissioner of the International Boundary Commission ("IBC"), and whether the Department of Justice ("DOJ") may represent the IBC or its U.S. Commissioner. The Court is asked to decide these matters with little historical guidance: it appears

that no President has ever attempted to fire the head of a treaty-based organization. These issues come before the Court on three procedural motions-DOJ's motion for extension of time (Dkt. No. 8), Commissioner Dennis Schornack's motion to quash (Dkt. No. 23), and DOJ's motion to strike (Dkt. No. 48). Having considered the parties' papers, and having heard oral argument on the matter, the Court ORDERS as follows:

1) Commissioner Schornack has been effectively removed from his post, and Commissioner David Bernhardt is the new Acting U.S. Commissioner of the IBC.

2) Commissioner Schornack's challenge to DOJ's authority to represent the IBC and its U.S. Commissioner is moot.

3) The Motion to Quash and Motion to Strike are DENIED. The Motion for Extension of Time is GRANTED. The parties have thirty (30) days to file a Joint Status Report and Defendants have sixty (60) days to respond to Plaintiffs' amended complaint.

## Background

This case arises from a dispute between the plaintiffs, Shirley-Ann and Herbert Leu, and the International Boundary Commission ("IBC"), a treaty-based binational commission that addresses boundary issues on the Canadian/American border, over a four-foot high retaining wall that the Leus built in their backyard near Blaine, Washington. Although within their property lines, the retaining

wall encroaches three feet into a 20-foot "boundary vista" maintained by the IBC. (Dkt. No. 14, Schornack Decl. ¶ 24.) In February 2007, the U.S. Commissioner of the IBC, Dennis Schornack, and the Canadian Commissioner, Peter Sullivan, contacted the Leus regarding the retaining wall. ( *Id.*) The Commissioners informed the Leus that their wall encroached on the boundary vista and requested that they cease all work on the wall. ( *Id.*) The Commissioners and the Leus were unable to reach a resolution regarding removal of the wall. ( *Id.*)

Plaintiffs threatened the IBC with a lawsuit and the IBC sought legal representation. In the 100-year history of the organization, no one had ever sued the IBC in the United States.[FN1] In addition, during Commissioner Schornack's tenure, the U.S. Government had not exercised influence or control over the day-to-day operations of the Commission. (Dkt. No. 14, Schornack Decl. ¶ 18.) In March 2007, Commissioner Schornack contacted the Office of the Legal Advisor at the State Department for legal advice and representation. (Dkt. No. 25, Schornack Decl. ¶ 6.) The State Department informed Commissioner Schornack that the IBC is independent of the State Department and that the State Department does not have authority to provide IBC with legal advice. ( *Id.* ¶ 6 & Ex. 1.) Commissioner Schornack then contacted officials at the Department of Justice ("DOJ"), who agreed that DOJ would defend the "United States on behalf of the Commission in litigation." ( *Id.* ¶ 7.) However, Commissioner Schornack claims that DOJ informed Commissioner Schornack that he would still need to obtain "international legal advice." [FN2] ( *Id.* ¶ 7.)

Commissioner Schornack retained Dr. Elliot Feldman of Baker & Hostetler LLP, to assist in representing the IBC and Commissioner Schornack and to provide legal advice regarding the Commission's authority under its governing treaties. ( *Id.* ¶ 8.) It appears from the record that a government procurement officer, and for some time, the U.S. Attorney's office, agreed to that arrangement. ( *Id.* ¶ 8.)

FN1. The parties have informed the Court that two suits against the IBC have been filed in Canada.

FN2. At oral argument, Assistant U.S. Attorney Brian Kipnis argued that "[n]o one in the Justice Department, including myself, either authorized, directed, approved or ordered Mr. Schornack to retain [outside legal counsel]." (Tr. 34.)

On April 6, 2007, the Leus, represented by the Pacific Legal Foundation, filed a complaint against the "U.S. Section" of the International Boundary Commission and against Commissioner Schornack in his official capacity, seeking declaratory and injunctive relief preventing IBC from destroying and removing the at-issue wall. On April 30, DOJ attorneys appeared on Defendants' behalf. (Dkt. No. 4.)

The relationship among Commissioner Schornack, DOJ, and Commissioner Schornack's private counsel quickly soured. As Commissioner Schornack stated in his declaration,[FN3] in late June 2007, Acting

Assistant Attorney General Ron Tenpas threatened to alienate Commissioner Schornack and the Commission from substantive discussions about the Leu litigation as long as the Commission was represented by private attorneys. (Dkt. No. 25, Schornack Decl. ¶ 10; *see also* Tr. 36.) Mr. Tenpas apparently stated that the Commission could only be represented by attorneys who worked for the President, for the purpose of vindicating the interests of the United States. ( *Id.* ¶ 13.) Commissioner Schornack was warned that he risked "personal exposure" if the Commission continued to be represented by private counsel.[FN4] ( *Id.* ¶ 10.)

FN3. Neither Plaintiffs, nor attorneys for DOJ, have offered any evidence contradicting Commissioner Schornack's recollection of events.

FN4. At oral argument, Assistant U.S. Attorney Kipnis stated that the issue of Commissioner Schornack's termination went up to the White House "because Mr. Schornack was no longer on the defense team." (Tr. 35-36, 43.) It is perplexing to the Court how Commissioner Schornack could ever be on a "different team" than the DOJ attorneys, given that the DOJ attorneys represented Commissioner Schornack and are bound by their ethical obligations as lawyers to represent their client's interests.

On July 5, Commissioner Schornack's team of private attorneys-Dr. Feldman, Michael Snarr, Michael McKay, and Kenneth Odza-filed notices of appearance in this case. On July 9, Commissioner

Schornack was contacted by an assistant to the President, Luis Reyes, who questioned Commissioner Schornack's commitment to the President. ( *Id.* ¶ 16-17.) Commissioner Schornack recalls that Mr. Reyes questioned his patriotism, his Republican credentials, and his understanding of a "unitary" form of government. ( *Id.*) Mr. Reyes communicated that if Commissioner Schornack did not fire his private attorneys and follow the direction of the Department of Justice, he would recommend that the President request Commissioner Schornack's resignation. ( *Id.* ¶ 18.) No request for a resignation was ever made.

Instead, on July 10, President George W. Bush, through an assistant, sent Commissioner Schornack a letter notifying him that his commission was terminated. ( *Id.*) The letter states, in its entirety:

Dear Mr. Schornack:

Pursuant to the direction of the President, this is to notify you that your appointment as United States Commissioner of the International Boundary Commission (U.S. and Canada) and Commissioner of the International Joint Commission, United States and Canada, is terminated effective immediately.

I would like to extend my best wishes in your future endeavors.

Sincerely,

Liza Wright

Assistant to the President for Presidential Personnel

( *Id.*) Commissioner Schornack responded by challenging the President's authority to terminate his commission. In a letter addressed to the President, Commissioner Schornack wrote:

Dear Mr. President:

I am in receipt of a facsimile, dated July 10, 2007, from Liza Wright, who wrote that she was acting pursuant to your direction. The note informs me that my appointment to the International Boundary Commission and the International Joint Commission "is terminated effective immediately." I am unable to recognize the authority of this communication because I do not believe that you would knowingly act beyond your authority, outside the law, or to otherwise jeopardize the national security of the United States.

Mr. President, you appointed me International Boundary Commissioner according to the Treaty of Washington of 1925. The Treaty specified that new commissioners may be appointed "upon the death, resignation, or other disability of either of them." Article IV. There is no other basis for appointment, nor any other basis for the creation of a vacancy on the Commission. There is no lawful presidential power to terminate the appointment of a commissioner.

For months I have been urging the Department of Justice to recognize the paramount importance of our national security along the international border with

Canada. Only the International Boundary Commission is empowered to keep the boundary clear and enable U.S. Border Patrol to operate; the course chosen by the Department of Justice would cripple the Commission, endanger our border and threaten law enforcement.

Sadly, the Department of Justice has insisted on subordinating the law and national security to a campaign promoting private property rights, even to the smallest restrictions. Officials of the Department of Justice have threatened me for weeks because I have honored the oath I took before God to respect the international treaties and protect our borders.

I respectfully request that this communication be reconsidered and rescinded. It has been a privilege but also a duty to serve, and I shall continue to do so until such time as there is a well-founded reason to do otherwise.

With profound respect,

Dennis Schornack

( *Id.*, Ex. 3.) That same day, President Bush appointed David Bernhardt Acting Commissioner on the part of the United States on the IBC. (Dkt. No. 35, Bernhardt Decl. ¶ 1.) Acting Commissioner Bernhardt notified Commissioner Schornack's private attorneys of his appointment, and directed them to immediately cease all work on this case. ( *Id.* ¶ 10, Ex. A.) The private attorneys continue to file papers on behalf of Defendants IBC and Schornack (hereinafter "Schornack Defendants").[FN5] The parties

dispute which person-Dennis Schornack or David Bernhardt-is the rightful commissioner and which group of attorneys-the DOJ or the private attorneys-represents the Commission and its U.S. Commissioner.

FN5. For the remainder of this order, the Court refers to the two groups of defendants in this case as the "Schornack" Defendants and the "Bernhardt" Defendants, to reflect the two individuals who purport to be the U.S. Commissioner of the IBC and their respective counsel.

Contemporaneously with the above listed events, the parties raised these and other issues through a number of different motions. In light of the "difficult questions of first impression" raised by Plaintiffs' complaint, on July 3, 2007, DOJ, purportedly representing Dennis Schornack and the IBC, requested that the Court extend the time to respond to Plaintiffs' complaint and to comply with the Court's Rule 26(f) scheduling order.[FN6] (Dkt. No. 8.) On July 5, the private attorneys, representing Dennis Schornack and the IBC, filed notices of appearance, a motion to dismiss, and a separately pleaded counterclaim. (Dkt.Nos.9-15, 18.) On July 9, the Schornack Defendants filed an opposition to DOJ's motion for an extension of time. (Dkt. No. 19). On July 12, the Schornack Defendants filed a surreply requesting that the Court strike DOJ's motion for extension of time (Dkt. No. 22) and also filed a separate motion to quash all DOJ filings in this matter, including DOJ's notice of appearance. (Dkt. No. 23.) On July 25, the Court heard argument

on the motion for an extension of time and motion to quash. Within a week after oral argument, Plaintiff moved to file an amended complaint (Dkt. No. 42), the Bernhardt Defendants filed a motion for judgment on the pleadings (Dkt. No. 47), and the Bernhardt Defendants filed a motion to strike all documents filed by Dennis Schornack's private attorneys (Dkt. No. 48).

FN6. It appears from the record that DOJ attorneys filed this motion without consulting their client, Commissioner Schornack. ( *See* Dkt. No. 19, at 3; *see also* Dkt. No. 25, Schornack Decl. ¶¶ 12-14.)

In response to this flurry of motions, the Court, on August 9, issued a Minute Order prohibiting the parties from filing any additional documents in this case, except to allow the parties to respond to some of the previously filed motions. (Dkt. No. 56.) Because the Bernhardt Defendants' motion to strike raised issues similar to those discussed at oral argument, the Court ordered the parties to respond to that motion. The Court re-noted the motion for extension of time and motion to quash to coincide with the noting date of the motion to strike. ( *Id.*) In a separate order, the Court granted Plaintiffs leave to amend their complaint and struck without prejudice the motions to dismiss and for judgment on the pleadings. (Dkt. No. 58.) Now fully briefed, the issues of whether the President has authority to remove Commissioner Schornack from his post and whether DOJ has authority to represent Defendants are ripe for the Court's consideration.

## Discussion

At the outset, the Court acknowledges the difficult legal issues involved in this case. This case presents novel constitutional issues, whose complexity is exacerbated by issues involving treaty interpretation, deference to the Executive in matters of foreign policy, and jurisprudence regarding whether treaties grant privately enforceable rights. The Court explores the respective areas of the law and the strengths and weaknesses of each parties' position before reaching its conclusion.

### I. Jurisdiction

Plaintiffs and the Bernhardt Defendants argue that the Court does not have jurisdiction over Commissioner Schornack's grievance. They argue that Commissioner Schornack does not have standing to file a motion seeking affirmative relief because he is no longer a party to this suit. They argue that under Federal Rule 25(d), Commissioner Bernhardt has been automatically substituted as the defendant in this suit. *See* Fed.R.Civ.P. 25(d)(1) (providing that when a public officer is a party to an action in his official capacity and "ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party"). But this argument assumes the truth of the matter asserted, i.e. that Commissioner Schornack has "ceased to hold office."

Plaintiffs and the Bernhardt Defendants also argue that the Court does not have jurisdiction over all necessary parties and that the Western District of

Washington is the wrong venue for Commissioner Schornack's "claims." The Court does not interpret Commissioner Schornack's position as a separate unlawful termination claim. To the extent that Commissioner Schornack makes allegations against the President, those allegations cannot be separated from this suit without the Court ruling on their merits. The Court therefore cannot avoid deciding the issue of which defendant is the actual defendant on jurisdictional grounds.

## II. Presidential Removal Power

In 2001, President Bush appointed Dennis Schornack "Commissioner on the part of the United States on the International Boundary Commission, United States and Canada ... during the pleasure of the President of the United States of America." (Dkt. No. 35, Bernhardt Decl. ¶ 14.) The general rule is that, under the *Appointments Clause* of the United States Constitution, U.S. Const. Art. II, § 2, cl.2, and the President's constitutional duty to "take care that the laws be faithfully executed," U.S. Const. Art. II, § 3, and absent a specific legislative provision to the contrary, the President can remove any officer whom he appoints. *Myers v. United States*, 272 U.S. 52, 161, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (noting that the "power to remove ... is an incident of [the President's] power to appoint").

### A. Removal Cases

The Supreme Court has developed its removal jurisprudence through a series of cases. In *Myers*, the Court upheld the right of the President to discharge

a postmaster even though Congress had limited the President's removal authority. 272 U.S. at 162-42, 47 S.Ct. 21. In *Humphrey's Executor v. United States*, the Supreme Court held that Congress may limit the President's power to remove officers from independent, quasi-judicial or quasi-legislative agencies. 295 U.S. 602, 629, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). Because the Federal Trade Commission Act limited removal of Federal Trade Commissioners to removal for specific causes enumerated in the Act, no removal could be made during the prescribed term of office (7 years), except for one or more of the enumerated causes. *Id.* at 631-32, 55 S.Ct. 869. The Court distinguished its previous removal cases on the grounds that they had involved purely executive officers ( *Myers* ) or had involved statutes that did not include a term of office ( *Shurtleff v. United States,* 189 U.S. 311, 23 S.Ct. 535, 47 L.Ed. 828 (1903)). *Id.* at 623, 627-28, 55 S.Ct. 869.

In *Wiener v. United States,* the Court concluded that President Eisenhower did not have the authority to fire a member of the War Claims Commission, even though the operative statute did not expressly limit the president's removal power. 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958). Because Congress intended the War Claims Commission to be independent from the executive, no power to remove for political reasons could be implied by Congress's silence on the matter. *Id.* at 356, 78 S.Ct. 1275. The Court suggested that it may read into an otherwise silent statute a "for cause" requirement for removal. *See id.; see also Federal Election Comm'n v. NRA Political Victory Fund,* 6 F.3d 821, 826 (D.C.Cir.1993) (suggesting in dicta

that the Federal Election Commission's structure and mission as well as its commissioners' terms suggest that the President can remove the commissioners only for good cause even though the statute is silent as to the President's removal authority); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir.1988) (assuming without deciding that President's authority to remove SEC members is limited to removal for good cause despite statute's silence).

And in *Morrison v. Olson*, the Court considered whether a provision of the Ethics in Government Act of 1978, 28 U.S.C § 49 *et seq.* , which restricted the Attorney General's power to remove independent counsel appointed under the Act to instances in which he could show "good cause," impermissibly interfered with the President's exercise of his constitutionally appointed functions. 487 U.S. 654, 685, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). The Court held that such a limitation was constitutional because the restriction did not "impede the President's ability to perform his constitutional duty." *Id.* at 691, 108 S.Ct. 2597. Thus, Congress could limit the President's power to remove the independent counsel, who investigates and prosecutes highranking Government officials for violations of federal criminal laws, because that office should be independent of the executive. *Id.* at 693, 108 S.Ct. 2597.

In this case, Commissioner Schornack points to no statute that limits the President's power to remove him. Instead, he points to language in the two treaties that govern the IBC. That treaty language

authorizes the President to appoint a new commissioner "upon the death, resignation, or other disability" of the former commissioner. The question here is whether that language effectively limits President Bush's authority to remove Commissioner Schornack from his commission.

B. Treaties of 1908 and 1925

The International Boundary Commission of the United States and Canada was born from efforts dating back to the Jay Treaty of 1794 to delineate and mark the boundary between our neighboring countries. *See* Alec McEwan, *The Value of International Boundary Commissions: The Canadian/American Experience,* at 2 (prepared for conference on International Boundary Management, IBRU, University of Durham, UK, September 2001) (filed with Court at Dkt. No. 32-2). During the 19th Century, Britain and the United States established several *ad hoc* commissions to identify and mark the location of the international boundary in certain areas. *Id.* In 1908, the two countries signed a treaty that established a commission to survey and mark the entire international boundary from the Atlantic Ocean to the Pacific Ocean. *See* Treaty Between the United States of America and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada From the Atlantic Ocean to the Pacific Ocean (April 11, 1908) (hereinafter, "1908 Treaty") (filed at Dkt. No. 14, Ex. 1). A 1925 treaty created a permanent commission to inspect and maintain the boundary, repair or replace boundary markers, keep the boundary vistas open, and to resolve boundary disputes between the two

countries. *See* Treaty Between the United States of America and His Britannic Majesty, in Respect of the Dominion of Canada, to Define More Accurately at Certain Points and to Complete the International Boundary Between the United States and Canada and to Maintain the Demarcation of That Boundary (February 24, 1925) (hereinafter "1925 Treaty") (filed at Dkt. No. 14, Ex. 2). The commission created consists of a Canadian and a United States commissioner, and their respective staff. The commissioners are jointly empowered to enact the treaty mandates; expenses incurred by the commissioners in carrying out their duties are paid for equally by each government. *Id.*, art. IV.

Both the 1908 and the 1925 treaties address how commissioner appointments shall be made. The 1908 Treaty provides that "[i]n case a vacancy occurs in any of the Commissions constituted by this Treaty, by reason of the death, resignation, or other disability of a Commissioner, before the work of such Commission is completed, the vacancy so caused shall be filled forthwith by the appointment of another Commissioner by the party on whose side the vacancy occurs...." 1908 Treaty, art. IX. The 1925 Treaty provides that the commissioners appointed under the provisions of the 1908 Treaty "shall continue to carry out the provisions of this Article, and, upon the death, resignation, or other disability of either of them, the Party on whose side the vacancy occurs shall appoint an Expert Geographer or Surveyor as Commissioner, who shall have the same powers and duties in respect to carrying out the provisions of this Article as are conferred by this Article upon the Commissioner appointed under the

provisions of the said Treaty of 1908." 1925 Treaty, art. IV.

Treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. Here, the treaty is silent regarding removal of commissioners-it neither grants authority to remove a commissioner nor limits the President's power to do so. The treaty language, however, suggests that the signatories envisioned limited opportunities for vacancies-a vacancy (for an American appointment) would only occur by the "death, resignation, or other disability" of the U.S. Commissioner. Thus, the treaty language suggests that the President's removal power is restricted-the President cannot create a vacancy (i.e., remove a Commissioner) except by requesting the U.S. Commissioner's resignation, or by identifying some "other disability" that prevents the Commissioner from fulfilling his commission. The treaty language therefore suggests that commissioners have a lifetime tenure.

The purposes behind these treaties supports the Court's reading of the language. The treaties were entered into to create a neutral Commission to define and maintain the international boundary after years of dispute over the boundary. ( *See* Schornack Decl. ¶¶ 5-9.) The Commissioners were intended to be expert surveyors and geographers who were jointly empowered and directed to inspect the various sections of the boundary line between the United

States and Canada, to repair and rebuild damaged border monuments, to keep the boundary vistas open, to maintain an effective boundary line between the countries, and to resolve disputes between the governments over the location of the boundary. 1925 Treaty, art. IV. The 1925 Treaty directs the Commissioners to jointly report to their respective governments at least once a year. ( *Id.)* These provisions create a binational organization that operates independently from the Canadian and American governments. Thus, independent of the analysis in the removal cases, the language and purposes of the 1908 and 1925 Treaties support Commissioner Schornack's argument that he is insulated from the President's removal power.

C. Is the President's Removal Power Effectively Limited?

The removal cases instruct that Congress may limit the President's removal power where independence from the executive is warranted. *See Morrison,* 487 U.S. at 693, 108 S.Ct. 2597; *Wiener,* 357 U.S. at 356, 78 S.Ct. 1275. Here, the language and purposes of the 1908 and 1925 Treaties suggest that the International Boundary Commission is an organization independent of the executive. Among other things, it is charged with resolving disputes between Canada and the United States over the location of the international boundary-a task that surely warrants independence from each country's political swings. Like with the FTC Commissioner in *Humphrey's Executor* and the independent counsel in *Morrison,* it is reasonable to believe that the party

States intended to insulate the IBC from the President's removal power.

That said, for a number of reasons, the Court cannot conclude that the treaties have that intended effect here. First, the treaties do not contain a specific term of years for the U.S. Commissioners. As the Supreme Court stated in *Shurtleff* in 1903, and as is still true today, with the exception of federal judges, "no civil officer has ever held office by a life tenure since the foundation of the government." *Shurtleff*, 189 U.S. at 314, 23 S.Ct. 535. The *Shurtleff* Court cautioned against assuming that Congress intended to create a position with life tenure unless Congress "use[d] language that put that intention beyond doubt." *Id.* at 318, 23 S.Ct. 535. Here, the 1908 and 1925 Treaties (negotiated by the Executive and ratified by the Senate) do not contain language suggesting that Canada and the United States intended to create positions with lifetime appointments.

Second, the actual commission signed by President Bush stated that Commissioner Schornack's appointment is "during the pleasure of the President of the United States for the time being." (Bernhardt Decl. ¶ 14.) The D.C. Circuit has suggested in dicta that a commissioner is bound by the terms stated in the commissioning document, and is estopped from claiming that her termination violates the statute under which she was appointed. *United States v. Wilson*, 290 F.3d 347, 359 n. 2 (D.C.Cir.2002). In *Wilson*, President Clinton had appointed Victoria Wilson to the United States Commission on Civil Rights under a commission that expressly stated that

the appointment was "for the remainder of the term expiring November 29, 2001." *Id.* at 350. After November 29, then-elected President Bush appointed Wilson's successor. *Id.* The Commission continued to recognize Wilson on the theory that the statute under which she was appointed provided for six-year terms that ran with each commissioner. The United States sued and the D.C. Circuit ruled in favor of the United States, holding that the six-year term ran with the calendar, and that because Wilson was appointed to fill a vacancy created by the death of a former commissioner who had not ended his term, her commission was only for the remainder of her predecessor's six-year term. *Id.* at 361-62. In addition to its statutory analysis, the court noted that because Wilson "failed to challenge the terms of her commission prior to its expiration ... she is arguably bound by those terms, and estopped from asserting an alleged violation of [the statute]." *Id.* at 359 n. 2. Likewise, Commissioner Schornack has presented no evidence suggesting that he ever objected to the terms in his commissioning document-specifically, that he serves at the pleasure of the President-and he therefore is arguably estopped from arguing that he is not terminable at will.

The Bernhardt Defendants argue that the President's decision to remove Commissioner Schornack and the commissioning document itself manifest the Executive's interpretation of his authority under the 1908 and 1925 treaties. The Bernhardt Defendants offer a letter from John Bellinger, Legal Adviser, U.S. Department of State, to Acting Assistant Attorney General Ronald Tenpas, in which Mr. Bellinger explains that the State

Department interprets the treaties as neither limiting the President's removal power nor affording Commissioner Schornack any private rights. (Dkt. No. 50, Kipnis Decl., Ex. B.) The meaning given a treaty's terms by the State Department is generally entitled to great weight. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *see also Cornejo v. County of San Diego,* 504 F.3d 853, 860 n. 12 (9th Cir.2007); *but see* REST.3D FOREICN RELATIONS LAW § 326 note 2 (noting that courts are less likely to defer to an Executive interpretation when that interpretation is adopted by the Executive in relation to a particular case before the courts); *United States v. Lombera-Camorlinga,* 206 F.3d 882, 887 (9th Cir.2000) (same).[FN7]

FN7. In addition, the Bernhardt Defendants argue that the Court should look to the "historical practice" of U.S. Commissioners stepping down when a new administration begins. *See Pocket Veto Case,* 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929) ("Long settled and established practice is a consideration of great weight in proper interpretation of constitutional provisions."). But it is not clear from the evidence that U.S. Commissioners *have* actually stepped down at the change of each administration. ( *Compare* Bernhardt Decl., Ex. C *with* Dkt. No. 36, Ex. D). And even if they had, voluntary retirements at the change of administrations would not make any more clear the strength of the President's removal authority here.

In addition, courts are generally hesitant to intrude on the President's powers in matters of foreign affairs. *See, e.g., Dep't of Navy v. Egan,* 484 U.S. 518, 527, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988). In *Egan,* the Supreme Court noted the "generally accepted view that foreign policy was the province and responsibility of the Executive" and the fact that courts have shown the "utmost deference" to the President in areas of Article II responsibilities. *Id.* The President has a "unique responsibility" for the conduct of foreign relations. *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993). It cannot be disputed that the IBC's duties involve matters of foreign affairs or that President Bush has made his intentions and his understanding of his authority under the treaties clear.

Given the foreign policy implications, the Court also wonders whether this case falls within the political question doctrine. Arising from Article III's case or controversy requirement and separation of powers concerns, the political question doctrine counsels that some cases do not present the type of question that can be properly addressed by the judiciary. *See Made in the U.S.A. Found. v. United States,* 242 F.3d 1300, 1311-12 (11th Cir.2001) (holding that the questions of whether certain kinds of international commercial agreements are treaties and whether the Treaty Clause represents the sole means of enacting such agreements into law are nonjusticiable political questions). The Supreme Court has developed a multi-factor inquiry for determining whether a question is a nonjusticiable

political question. A court must ask whether the case involves:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also Goldwater v. Carter*, 444 U.S. 996, 998, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Powell, J., concurring) (combining factors into three-part inquiry). Although neither party mentions the doctrine, because the issues presented are so intertwined with both the President's removal power and his authority over matters of foreign policy, this case arguably presents nonjusticiable political questions.

Most importantly, the Court concludes that the 1908 and 1925 Treaties do not avail Commissioner Schornack of any rights. Treaties and other international agreements generally do not create judicially enforceable individual rights. *United States v. Emuegbunam*, 268 F.3d 377, 389-90 (6th Cir.2001) (quoting *Head Money Cases*, 112 U.S. 580,

598, 5 S.Ct. 247, 28 L.Ed. 798 (1884)). Courts often presume that the rights created by an international treaty belong to a State and that a private individual cannot enforce them. *Id.* "It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Matta-Ballesteros v. Henman,* 896 F.2d 255, 259 (7th Cir.1990) ("Treaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.") (quoting *United States v. Zabaneh,* 837 F.2d 1249, 1261 (5th Cir.1988)). Whether characterized as a presumption, "the general rule is that 'international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts....' " *Cornejo v. County of San Diego,* 504 F.3d at 859 (quoting 2 RESTATEMENT 3D OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907, cmt. a (1987)).

In limited circumstances, treaties can create individually enforceable rights. *See id.,* at 858-59 n. 10 (listing cases). Whether or not treaty violations provide the basis for particular claims or defenses depends upon the particular treaty and claim involved. *United States v. Lombera-Camorlinga,* 206 F.3d 882, 885 (9th Cir.2000) (en banc), *cert. denied,* 531 U.S. 991, 121 S.Ct. 481, 148 L.Ed.2d 455 (2000). Whether a treaty provides a right or requires that a remedy be made available to a private person is therefore a matter of treaty interpretation. *See* 2

REST.3D FOREIGN RELATIONS LAW § 907, cmt. a.

The 1908 and 1925 Treaties do not provide any rights intended for a commissioner's benefit nor do they indicate the availability of private remedies. The Court is guided in its analysis by the Ninth Circuit's recent decision in *Cornejo v. County of San Diego* and the Sixth Circuit's decision in *United States v. Emuegbunam*. In *Cornejo*, the Ninth Circuit considered whether Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, creates judicially enforceable rights that may be vindicated in an action brought under 42 U.S.C. § 1983. That Article states that foreign nationals shall be advised of their "right" to have a consular officer notified of their arrest, and that the arresting state must forward communications from the detainee to the consular post. 21 U.S.T. at 100-101. In interpreting the treaty, the Ninth Circuit held that although the language "arguably confers on an individual the right to consular assistance following arrest," given the "unmistakable focus" of the treaty-consular functions between States-Article 36 does not create any judicially enforceable rights. 504 F.3d at 854, 860, 863-64. Likewise, in *Emuegbunam*, the Sixth Circuit considered whether the government's failure to notify a foreign national of his right to consular assistance provided grounds for dismissal of the indictment or reversal of his conviction on direct appeal. 268 F.3d at 386. The court held that the language of the treaty and its interpretation by the State Department both confirmed that the "rights" in Article 36 "belong to the party states, not individuals," and that therefore,

the state's failure to notify Emuegbunam of his consular rights did not provide a basis to overturn his conviction. *Id.* at 392-94; *see also United States v. Jimenez-Nava,* 243 F.3d 192, 198-99 (5th Cir.2001) (holding that Article 36 does not provide judicially enforceable individual rights and declining to apply exclusionary rule for Article 36 violation).

Unlike the language in Article 36, which "arguably confers on an individual the right to consular assistance following arrest," *see Cornejo,* 504 F.3d at 859 (quoting *Breard v. Greene,* 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998)), the language in the 1908 and 1925 Treaties does not even suggest that a commissioner has a "right" to his post, or that he has a "right" to a certain process for removal. Instead, the treaties define the powers and obligations of Canada and the United States in relation to appointment. *Cf. id.* The treaties obligate the States to appoint new commissioners and specify when a vacancy requiring appointment of a new commissioner occurs; the treaties do not confer any rights regarding removal or appointment that operate to the benefit of an individual commissioner. These treaties are technical prescriptions regarding the boundary lines between neighboring countries. They are focused, not on an individual's right to his commission,[FN8] but on the rather mundane work of maintaining a peaceful border-delineating and marking the boundary and keeping it free of obstructions.

FN8. Commissioner Schornack contends that he is not bringing a unlawful termination claim or seeking any "rights" under the treaty. But that assertion is

undermined by his central argument in this dispute that the President does not have authority to fire him. These are two sides of the same coin a coin that cannot benefit Commissioner Schornack's position here.

D. Conclusion

This case presents difficult issues and the parties have presented strong arguments on both sides. On the one hand, the 1908 and 1925 Treaties created an independent binational organization it is reasonable that the party States intended to insulate the commissioners from the political swings of each countries' respective administration by limiting the power to remove the commissioners. Because independence from the Executive is warranted, this case is arguably more akin to *Humphrey's Executor*, *Wiener*, and *Morrison*, than to *Shurtleff* or *Myers*.

But any similarity to those cases is marginalized by the unique facts of this case. The 1908 and 1925 treaties do not create judicially enforceable individual rights regarding appointment or removal. The treaties create obligations between States that are enforceable through political and diplomatic channels, or by other remedies available in international law, not by individuals in domestic courts. *See Medellin v. Dretke*, 544 U.S. 660, 685, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005) (O'Connor, J., dissenting) (explaining that where no privately enforceable rights are conferred by a treaty, "[t]he complainant must be the ... state, and any remedy is political, diplomatic, or between the states in

international law"); *Cornejo*, 504 F.3d at 860 n. 11. In this case, it is Canada's exclusive right to protest, and as far as the Court is aware, Canada has not done so.[FN9] Because the language that arguably restricts the President's removal power is in a treaty, rather than a statute, and because treaties do not create judicially enforceable individual rights, the Court is left with no law that restricts the President's otherwise unfettered removal power.[FN10]

FN9. Edward Alex Lee, Director of the Office of Canadian Affairs in the Department of State's Bureau of Western Hemisphere Affairs and also the current Acting Deputy Assistant Secretary of State for Canada and Mexico in the Western Hemisphere Bureau states in his declaration that Canada is not contesting Commissioner Schornack's removal:
The Canadian Department of Foreign Affairs and International Trade has advised the United States Department of State that the Government of Canada considers the process of appointment, tenure, and termination of the U.S. Commissioner of the International Boundary Commission (U.S. and Canada) to be a matter within the sole purview of the U.S. Government, and the actions taken by the United States in this case to be consistent with the treaties.

(Dkt. No. 49, Lee Decl. ¶ 3.) But that statement is hearsay: the Court cannot rely on the State Department's recollection of the Canadian government's position on the matter. The Court is left with Canada's silence regarding Commissioner

Schornack's removal and that silence suggests acquiescence.

FN10. Although he analogizes his situation to cases such as *Humphrey's Executor* and *Wiener* (in which a Congressional act was held to lawfully restrict the President's removal power), Commissioner Schornack alternatively argues that he is not an Officer of the United States or an inferior officer for Article II purposes. ( *See* Dkt. No. 60, at 12.) He therefore suggests that he was not appointed under the President's Article II, § 2 appointment authority. The Court need not resolve the issue of whether Commissioner Schornack is an "officer" under Article II. Commissioner Schornack's strongest argument is that he *is* an inferior officer and that, under the *Humphrey's Executor* line of cases, the President's removal power is restricted here. If Commissioner Schornack is *not* an officer, and therefore the Supreme Court's removal cases are inapplicable, Commissioner Schornack's only support for his argument that the President cannot remove him are the 1908 and 1925 Treaties themselves, which, as the Court already explained, cannot benefit him here.

As suggested in *Wiener*, the Court could import a "for cause" limitation on the President's removal power. *See Wiener*, 357 U.S. at 356, 78 S.Ct. 1275; *see also Blinder, Robinson & Co.*, 855 F.2d at 681. But in light of all of the other factors weighing in favor of the President's authority in these matters, the Court concludes that to do so would be inappropriate. Matters of "foreign policy [are] the province and responsibility of the Executive." *Egan*, 484 U.S. at 529, 108 S.Ct. 818. Commissioner

Schornack is arguably estopped from arguing that he was not an at-will employee because he never challenged the terms of his commission. *See Wilson,* 290 F.3d at 359 n. 2. And the Supreme Court has cautioned against approving of a commission with lifetime tenure. *See Shurtleff,* 189 U.S. at 316, 23 S.Ct. 535. For all of these reasons, the Court concludes that Commissioner Schornack cannot effectively challenge the President's authority to remove him. Commissioner Schornack's termination and Commissioner Bernhardt's subsequent appointment, are presumptively valid.

III. Representation by the Department of Justice

The Schornack Defendants challenge the authority of the Department of Justice to represent the IBC and its U.S. Commissioner. They contend that because the IBC is not a federal agency, and its U.S. Commissioner is not a federal officer, DOJ is not authorized under 28 U.S.C. § 516 to represent the defendants in this matter.

The Court need not resolve in the context of these motions the issue of whether the IBC is an agency or whether the U.S. Commissioner is a federal officer. Commissioner Schornack is no longer a party to this litigation. Commissioner Bernhardt has asked the DOJ to represent the defendants in this lawsuit, and it appears from Commissioner Bernhardt's declaration that Canadian Commissioner Sullivan concurs.[FN11] ( *See* Dkt. No. 51, Bernhardt Decl. ¶ 4.) Moreover, 28 U.S.C. § 517 "plainly confers upon the Attorney General broad discretion in his decision to dispatch government lawyers to 'to attend to any ...

interest of the United States.' " *Hall v. Clinton,* 285 F.3d 74, 80 (D.C.Cir.2002) (quoting 28 U.S.C. § 517) (noting that 28 U.S.C. § 517 "appear[s] to permit representation [by the Department of Justice] of private individuals as long as a government interest is at stake"). In any event, without a live controversy on the issue, the challenge to DOJ's authority to represent the defendants is moot.[FN12]

FN11. Commissioner Bernhardt states in his declaration: "Commissioner Peter Sullivan, the Canadian Commissioner, knows that I have directed attorneys Feldman, Snarr, McKay, and Odza to cease work on this lawsuit on behalf of the U.S. Commissioner and the Commission and that I have asked the Department of Justice to represent the defendants in this lawsuit. Commissioner Sullivan concurs with both actions." (Dkt. No. 51, Bernhardt Decl. ¶ 4.) Again, this statement is hearsay; but as mentioned above, Canada's silence on the matter suggests acquiescence to DOJ's representation.

FN12. The Court therefore need not consider whether, as the Bernhardt Defendants contend, the private attorneys violated Federal Rules 7(b)(3) and 11(a) and Local General Rule 2(g)(3) by appearing in this matter without seeking or obtaining a substitution of counsel.

## Conclusion

In the context of three procedural motions, the Court was asked to decide whether the President of the United States has the authority to remove the

United States Commissioner of the International Boundary Commission, and whether the Department of Justice may represent the IBC or its U.S. Commissioner. The Court concludes that Commissioner Schornack has been effectively removed from his post and that Commissioner David Bernhardt is the new Acting U.S. Commissioner of the IBC. Because Commissioner Bernhardt requests legal representation from the Department of Justice, the issue of DOJ's authority to represent the IBC or its U.S. Commissioner is moot.

The Court does not find it necessary to strike any papers already filed. The motions to quash and to strike are therefore DENIED. The parties will move forward with litigating the original issues presented in Plaintiffs' complaint in a manner consistent with this order. The motion for an extension of time to respond to the complaint and to comply with the Court's Rule 26(f) scheduling order is GRANTED.

Within thirty (30) days of this order, the parties must provide the Court with a Joint Status Report that will allow the Court to set a case schedule in this matter. The Defendants have sixty (60) days from the date of this order to respond to Plaintiffs' amended complaint.

The clerk is directed to send copies of this order to all parties.

# APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Docket No. 07-35949

Shirley Ann Leu; Herbert Leu, Plaintiffs-Appellees

v.

International Boundary Commission, et. al.,
Defendants-Appellants, Defendants-Appellees

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Before: HALL, WARDLAW and GOULD, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

The petition for en banc rehearing has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

# APPENDIX D

Convention between the United States and Great Britain relating to the Canadian international boundary.

Signed at Washington, April 11, 1908;
Ratification advised by the Senate, May 14, 1908;
Ratified by the President, May 11, 1908;
Ratified by Great Britain, May 16, 1908;
Ratifications exchanged at Washington, June 4, 1908;
Proclaimed July 1, 1908.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the United Kingdom of Great Britain and Ireland, providing for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, was concluded and signed by their respective Plenipotentiaries at Washington, on the eleventh day of April, one thousand nine hundred and eight, the original of which Convention is word for word as follows:

The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous of providing for the more complete definition

and demarcation of the international boundary between the United States and the Dominion of Canada, have for that purpose resolved to conclude a treaty, and to that end have appointed as their Plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

His Britannic Majesty, Right Honorable James Bryce, O. M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, after having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

ARTICLE I.

The boundary through Passamaquoddy Bay.

The High Contracting Parties agree that each shall appoint, without delay, an expert geographer or surveyor to serve as Commissioners for the purpose of more accurately defining and marking the international boundary line between the United States and the Dominion of Canada in the waters of Passamaquoddy Bay from the mouth of the St. Croix River to the Bay of Fundy, and that in defining and marking said boundary line the Commissioners shall adopt and follow, as closely as may be, the line surveyed and laid down by the Commissioners appointed under Article II of the Treaty of July 22,

1892, between the United States and Great Britain, so far as said Commissioners agreed upon the location of said line, namely:

(1) From a point at the mouth of the St. Croix River defined by the ranges established by them, by a connected series of six straight lines defined by ranges and cross ranges, to a point between Treat Island and Friar Head, likewise defined by ranges and cross ranges established by them; and also

(2) From a point in Quoddy Roads, defined by the intersection of the range passing through the position of the Beacon of 1886 and Lubec Channel Light, with a range established by them on the west shore of Quoddy Roads along the course of this latter range, which is about 80° 35' east of true south, into the Bay of Fundy.

In ascertaining the location of the above-described line, the Commissioners shall be controlled by the indications of the range marks and monuments established along its course by said former Commissioners and by the charts upon which the said Commissioners marked the line as tentatively agreed upon by them.

The remaining portion of the line, lying between the two above-described sections, and upon the location of which said former Commissioners did not agree, shall pass through the center of the Lubec Narrows Channel between Campo Bello Island and the mainland, and, subject to the provisions hereinafter stated, it shall follow on either side of the said Narrows such courses as will connect with the parts of the line agreed upon as aforesaid, and such

boundary shall consist of a series of straight lines defined by distances and courses; but inasmuch as differences have arisen in the past as to the location of the line with respect to Pope's Folly Island above Lubec Narrows and with respect to certain fishing grounds east of the dredged channel below Lubec Narrows, it is agreed that each of the High Contracting Parties shall present to the other within six months after the ratification of this Treaty a full printed statement of the evidence, with certified copies of original documents referred to therein which are in its possession, and the arguments upon which it bases its contentions, with a view to arriving at an adjustment of the location of this portion of the line in accordance with the true intent and meaning of the provisions relating thereto of the treaties of 1783 and 1814 between the United States and Great Britain, and the award of the Commissioners appointed in that behalf under the treaty of 1814; it being understood that any action by either or both Governments or their representatives authorized in that behalf or by the local governments on either side of the line, whether prior or subsequent to such treaties and award, tending to aid in the interpretation thereof, shall be taken into consideration in determining their true intent and meaning. Such agreement, if reached, shall be reduced to writing in the form of a protocol and shall be communicated to the said Commissioners, who shall lay down and mark this portion of the boundary in accordance therewith and as herein provided.

In the event of a failure to agree within six months after the date of exchanging the printed statements aforesaid, the question of which Government is

entitled to jurisdiction over such island and fishing grounds under treaty provisions, and proceedings thereunder, interpreted in accordance with their true intent and meaning as above provided, and by reason of any rights arising under the recognized principles of international law, shall be referred forthwith for decision upon the evidence and arguments submitted as aforesaid, with such additional statement of facts as may be appropriate, and an argument in reply on each side, to an arbitrator to be agreed upon by the two Governments, or, in case of a failure to agree, to be appointed by a third Power selected by the two Governments by common accord, or, if no agreement is thus arrived at, each Government shall select a different Power and the choice of the arbitrator shall be made in concert by the Powers thus selected. The decision of such arbitrator shall be final, and the line shall be laid down and marked by the said Commissioners in accordance therewith and as herein provided.

The arbitrator shall be requested to deliver, together with his award, a statement of all the costs and expenses incurred by him in connection with the arbitration, which shall forthwith be repaid by the two Governments in equal moieties.

It is further agreed that if, under the foregoing provisions, the boundary be located through the channel to the east of the dredged channel above mentioned, the latter shall be equally free and open for the passage of ships, vessels, and boats of both parties.

The entire boundary shall be marked by permanent

range marks established on land and, if desirable in the opinion of Commissioners, by buoys in the water, so far as practicable, and by such other boundary marks and monuments and at such points as the Commissioners may determine to be necessary; but the said Commissioners shall proceed to define and mark and chart the portion of the line agreed upon by the former Commissioners under the Treaty of 1892 aforesaid without waiting for the final determination of the location of the remaining portion of the line.

The course of the said boundary line as defined and marked as aforesaid shall be laid down by said Commissioners on quadruplicate sets of accurate modern charts prepared or adopted by them for that purpose, which charts shall be certified and signed by the Commissioners, and two duplicate originals thereof shall be filed by them with each Government; and they shall also prepare in duplicate and file with each Government a joint report or reports under their hands and seals describing in detail the course and location of the boundary line and the range marks and monuments and buoys marking it.

The line so defined and laid down shall be taken and deemed to be the international boundary from the Bay of Fundy to the mouth of the St. Croix River, as established by treaty provisions and the proceedings thereunder.

## ARTICLE II.

The boundary from the mouth to the source of the St. Croix River.

Whereas Article II of the Treaty of 1783 between the United States and Great Britain provides that a line drawn along the middle of the River St. Croix from its mouth in the Bay of Fundy to its source shall be, between those points, the international boundary between the United States and the British possessions in North America, and the identity of the River St. Croix has been determined by the Commissioners appointed for that purpose under Article V of the Treaty of 1794 between the United States and Great Britain, and the location of the mouth and the source of said river has been duly established, and the course of said river has been described, surveyed, and charted by said Commissioners, as appears from their joint report dated the 25th day of October, 1798, and from the chart or plan of said river prepared and filed by them with said report, but said line of boundary along the middle of said river was not laid down by them on said chart or plan, and was not marked or monumented by them along the course of said river; and whereas, pursuant to an additional article, dated March 15, 1798, supplementing the provisions of the Treaty of 1794 above referred to, a monument was erected by joint action of the two Governments marking the source of the River St. Croix, but said line of boundary through the River St. Croix has not otherwise been monumented and has never been laid down on charts by joint action of the two Governments: therefore, in order to complete and render thoroughly effective the demarkation of the boundary described and established as aforesaid,

It is agreed that each of the High Contracting

Parties shall appoint, without delay, an expert geographer or surveyor as a Commissioner, and the Commissioners so appointed shall jointly lay down upon accurate modern charts, to be prepared or adopted by them for that purpose, the line of boundary along the middle of the River St. Croix from its mouth to its source as defined and established by the existing treaty provisions and the proceedings thereunder, above referred to, with the agreed understanding, however, that the line of boundary through said river shall be a water line throughout and shall follow the center of the main channel or thalweg as naturally existing, except where such course would change, or disturb, or conflict with the national character of an island as already established by mutual recognition and acquiescence, in which case the line shall pass on the other side of any such island, following the middle of the channel nearest thereto, or, if the Commissioners find that the national character of any island is in dispute, the question of its nationality shall be submitted by them to their respective Governments, with a chart or map certified jointly by said Commissioners, showing the depth and volume of the water at its high and low stages between such island and the river banks on each side and indicating the course of the main channel of the river as it passes such island, together with a descriptive statement by said Commissioners showing the reasons for selecting such channel as the main channel; and in all such cases the High Contracting Parties agree that the location of the boundary with respect to each island in dispute shall be determined and settled in accordance with the following rules:

(1) The nationality of each island in dispute shall be determined by the predominance of the claims established on either side to such island, arising from the exercise of jurisdiction and sovereignty over it, including such exercise of jurisdiction by the local governments on either side of the line.

(2) The burden of proving the nationality of any such island shall be upon the party seeking to change the general course of the boundary as above prescribed so as to include such island on its own side of the boundary.

(3) The selection by the Commissioners of the main channel passing such island shall not be conclusive upon the parties hereto and is subject to review, but the burden of proving the main channel to be other than the one selected shall be upon the party proposing the change.

The Government proposing such change in the prescribed course of the boundary shall, upon the submission of the question of the nationality of any island or islands by the Commissioners as aforesaid, promptly present to the other Government a printed statement, with certified copies of any original documents in its possession referred to therein, showing the grounds and arguments upon which its claim of jurisdiction and ownership with respect to such island rests. Unless an agreement is reached upon the presentation of such statement, the Government to which such statement is presented shall within six months after its receipt present in reply a similar statement showing the grounds and arguments upon which the claims of the other

Government are contested. If an agreement is reached between the two Governments, it shall be reduced to writing in the form of a protocol and shall be communicated to the said Commissioners, who shall proceed to lay down and mark the boundary so as to leave such island on the side of the boundary to which it is shown it belongs, in accordance with the determination of its nationality arrived at as aforesaid.

In the event of a failure by the two Governments to come to an agreement within six months after the presentation of the printed statements in reply herein above provided for, then the question of the nationality of the islands in dispute shall be referred forthwith for decision under the rules herein above set forth for the determination of that question, and under the recognized principles of international law not inconsistent therewith, and upon the evidence and arguments submitted as aforesaid, with such additional statement of facts as may be appropriate, and such further printed argument on each side as may be desired, to an arbitrator to be agreed upon by the two Governments, or, in case of a failure to agree, to be appointed by a third Power selected by the two Governments by common accord, or, if no agreement is thus arrived at, each Government shall select a different Power and the choice of the arbitrator shall be made in concert by the Powers thus selected. The decision of such arbitrator shall be final, and the line shall be laid down and marked by the said Commissioners in accordance therewith and as herein provided.

The arbitrator shall be requested to deliver,

together with his award, a statement of all the costs and expenses incurred by him in connection with the arbitration, which shall forthwith be repaid by the two Governments in equal moieties.

It is further agreed that so far as practicable the said Commissioners shall establish boundary monuments and ranges and buoys marking the course and location of the said line, and showing on which side of the boundary the several islands lying in said river belong, wherever in their judgment it is desirable that the boundary be so marked.

The charts upon which the boundary is marked as aforesaid shall be in quadruplicate, and shall be certified and signed by said Commissioners, and two duplicate originals thereof shall be filed by them with each Government, and it shall also be the duty of said Commissioners to prepare in duplicate, and file with each Government, a joint report under their hands and seals describing the line so marked by them and the monuments and range marks and buoys marking it.

The line so defined and laid down shall be taken and deemed to be the international boundary from the mouth to the source of the St. Croix River as established by treaty provisions and the proceedings thereunder as aforesaid.

## ARTICLE III.

The boundary from the source of the St. Croix River to the St. Lawrence River.

Whereas the remonumenting of the course of the boundary defined and laid down under the provisions of Articles I and VI of the Treaty of August 9, 1842, between the United States and Great Britain has already been undertaken without a formal treaty agreement, but by the joint and concurrent action of the Governments of the United States and Great Britain, certain monuments between Vermont and Canada having been relocated in 1849, and the portion of said boundary extending between Hall's Stream and the St. Lawrence River in part having been remonumented in recent years and in part is now being remonumented under such action on both sides; and whereas the Commissioners appointed under Article VI of the Treaty of 1842 aforesaid were required to and did mark by monuments the land portion only of said line, and were not required to and did not mark by monuments the portions of the boundary extending along water courses, with the exception that the nationality of the several islands in the St. John River was indicated by monuments erected thereon and a series of monuments was placed by them along the edge of certain of the water courses to fix the general direction of the boundary, most of which monuments have since disappeared, but the entire boundary, including its course through the waterways as well as on land, was charted and marked on maps by said Commissioners under the provisions of Article VI above referred to, and the nationality of the respective islands in the St. John River was determined by them, as appears from the joint report filed by said Commissioners dated June 28, 1847, and the series of maps signed by said Commissioners and filed with their joint report; and whereas the portion of the line through said

waterways has not since been monumented or marked along its course by joint action of the two Governments, and the monuments placed by said Commissioners along the land portion of said boundary require repairing and renewing where such work has not already been done in recent years, and additional or supplementary intermediate monuments at convenient points are required under modern conditions: therefore, in order to carry on and complete the work already undertaken as aforesaid, and to reestablish the location of said boundary and render thoroughly effective the demarcation of the said boundary as existent and established,

It is agreed that each of the High Contracting Parties shall appoint, without delay, an expert geographer or surveyor as a Commissioner, and under the joint direction of such Commissioners the lost or damaged boundary monuments shall be relocated and repaired, and additional monuments and boundary marks shall be established wherever necessary in the judgment of the Commissioners to meet the requirements of modern conditions along the course of the land portion of said boundary, and where the said boundary runs through waterways it shall be marked along its course, so far as practicable, by buoys and monuments in the water and by permanent ranges established on the land, and in such other way and at such points as in the judgment of the Commissioners it is desirable that the boundary be so marked; and it is further agreed that the course of the entire boundary, as described in Article I of the Treaty of 1842 and as laid down as aforesaid under Article VI of that Treaty, shall be

marked by said Commissioners upon quadruplicate sets of accurate modern charts prepared or adopted by them for that purpose, and that said charts so marked shall be certified and signed by them and two duplicate originals thereof shall be filed with each Government, and said Commissioners shall also prepare in duplicate and file with each Government a joint report or reports describing in detail the course of the boundary so marked by them, and the character and location of the several monuments and boundary marks and ranges marking it.

The line so defined and laid down shall be taken and deemed to be the international boundary as defined and laid down under Articles I and VI of the said Treaty of 1842.

## ARTICLE IV.

### The boundary from its intersection with the St. Lawrence River to the mouth of Pigeon River.

The High Contracting Parties agree that the existing International Waterways Commission, constituted by concurrent action of the United States and the Dominion of Canada and composed of three Commissioners on the part of the United States and three Commissioners on the part of the Dominion of Canada, is hereby authorized and empowered to ascertain and reestablish accurately the location of the international boundary line beginning at the point of its intersection with the St. Lawrence River near the forty-fifth parallel of north latitude, as determined under Articles I and VI of the Treaty of

August 9, 1842, between the United States and Great Britain, and thence through the Great Lakes and communicating waterways to the mouth of Pigeon River, at the western shore of Lake Superior, in accordance with the description of such line in Article II of the Treaty of Peace between the United States and Great Britain, dated September 3, 1783, and of a portion of such line in Article II of the Treaty of August 9, 1842, aforesaid, and as described in the joint report dated June 18, 1822, of the Commissioners appointed under Article VI of the Treaty of December 24, 1814, between the United States and Great Britain, with respect to a portion of said line and as marked on charts prepared by them and filed with said report, and with respect to the remaining portion of said line as marked on the charts adopted as treaty charts of the boundary under the provisions of Article II of the Treaty of 1842, above mentioned, with such deviation from said line, however, as may be required on account of the cession by Great Britain to the United States of the portion of Horse Shoe Reef in the Niagara River necessary for the light-house erected there by the United States in accordance with the terms of the protocol of a conference held at the British Foreign Office December 9, 1850, between the representatives of the two Governments and signed by them agreeing upon such cession; and it is agreed that wherever the boundary is shown on said charts by a curved line along the water the Commissioners are authorized in their discretion to adopt, in place of such curved line, a series of connecting straight lines defined by distances and courses and following generally the course of such curved line, but conforming strictly to the description of the boundary

in the existing treaty provisions, and the geographical corrdinates of the turning points of such line shall be stated by said Commissioners so as to conform to the system of latitudes and longitudes of the charts mentioned below, and the said Commissioners shall so far as practicable mark the course of the entire boundary line located and defined as aforesaid, by buoys and monuments in the waterways and by permanent range marks established on the adjacent shores or islands, and by such other boundary marks and at such points as in the judgment of the Commissioners it is desirable that the boundary should be so marked; and the line of the boundary defined and located as aforesaid shall be laid down by said Commissioners on accurate modern charts prepared or adopted by them for that purpose, in quadruplicate sets, certified and signed by the Commissioners, two duplicate originals of which shall be filed by them with each Government; and the Commissioners shall also prepare in duplicate and file with each Government a joint report or reports describing in detail the course of said line and the range marks and buoys marking it, and the character and location of each boundary mark. The majority of the Commissioners shall have power to render a decision.

The line so defined and laid down shall be taken and deemed to be the international boundary as defined and established by treaty provisions and the proceedings thereunder as aforesaid from its intersection with the St. Lawrence River to the mouth of Pigeon River.

ARTICLE V

The boundary from the mouth of Pigeon River to the northwesternmost point of the Lake of the Woods.

In order to complete and perfect the demarcation of the international boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River, at the western snore of Lake Superior, to the northwesternmost point of the Lake of the Woods, which boundary is defined in Article II of the Treaty of Peace between the United States and Great Britain dated September 3, 1783, and in Article II of the Treaty of August 9, 1842, between the United States and Great Britain, wherein is defined also the location of the said northwesternmost point of the Lake of the Woods, and the greater part of the said boundary is marked on charts covering that section of the boundary adopted as treaty charts of the boundary under the provisions of Article II of the Treaty of 1842 aforesaid, but has never been actually located or monumented along its course by joint action of the two Governments, and no joint survey of its course has been made since the survey under the direction of the Commissioners appointed under Article VII of the Treaty of December 24, 1814, between the United States and Great Britain, under whose direction the charts above mentioned were prepared,

It is agreed that each of the High Contracting Parties shall appoint, without delay, an expert geographer or surveyor as Commissioners, who shall reestablish and fix the actual location of said entire boundary described and charted as aforesaid, and

designate the side of the boundary upon which each island adjacent to the boundary belongs, it being mutually understood that the boundary, so far as practicable, shall be a water line and shall not intersect islands lying along its course, and the Commissioners shall so far as practicable mark such boundary along its course by monuments and buoys and range marks, and such other boundary marks as the Commissioners may determine, and at such points as in their judgment it is desirable that the boundary shall be so marked; and it is further agreed that the course of the entire boundary as described and laid down as aforesaid and as monumented by said Commissioners shall be marked by them upon quadruplicate sets of accurate modern charts prepared or adopted by them for that purpose, and that said charts so marked shall be certified and signed by them and two duplicate originals thereof shall be filed with each Government, and said Commissioners shall also prepare in duplicate and file with each Government a joint report or reports describing in detail the course of the boundary so marked by them and the character and location of the several monuments and boundary marks and ranges marking it.

The line so defined and laid down shall be taken and deemed to be the international boundary as defined and established under the aforesaid treaties from the mouth of Pigeon River to the northwesternmost point of the Lake of the Woods.

ARTICLE VI.

The boundary from the northwesternmost point of

the Lake of the Woods to the
summit of the Rocky Mountains.

In order to complete and render thoroughly effective the demarcation of the international boundary between the United States and the Dominion of Canada from the northwesternmost point of the Lake of the Woods to the summit of the Rocky Mountains, which boundary, according to existing treaties, runs due south from said northwesternmost point to the forty-ninth parallel of north latitude and thence along that parallel to the summit of the Rocky Mountains, and has been surveyed and charted and monumented as appears from the series of twenty-four sectional maps covering this portion of the boundary prepared and filed by the Joint Commission appointed for that purpose by joint action of the two Governments in 1872,

It is agreed that each of the High Contracting Parties shall appoint, without delay, an expert geographer or surveyor as a Commissioner, and under the joint direction of such Commissioners lost or damaged monuments along the course of said boundary shall be relocated and repaired and additional monuments and boundary marks shall be established wherever necessary, in the judgment of the Commissioners, to meet the requirements of modern conditions and to render more effective the demarcation of the existent boundary established under the treaty provisions and proceedings thereunder as aforesaid; and it is further agreed that in carrying out these provisions the said Commissioners shall observe the agreement stated in

the protocol of the final meeting, dated May 29, 1876, of the Joint Commission aforesaid, which is as follows:

> "2. In the intervals between the monuments along the parallel of latitude, it is agreed that the line has the curvature of a parallel of 49° north latitude; and that such characteristic shall determine all questions that may hereafter arise with reference to the position of the boundary at any point between neighboring monuments.
>
> "3. It is further agreed that, in the event of any of the said three hundred and eighty-eight monuments or marks being obliterated beyond the power of recognition, the lost site or sites shall be recovered by their recorded position relatively to the next neighboring unobliterated mark or marks."

It is further agreed that the said Commissioners shall mark upon quadruplicate sets of accurate modern charts prepared or adopted by them for that purpose the entire course of said boundary and the location of the boundary monuments and marks established along the course of said boundary, and two duplicate originals thereof shall be filed with each Government, and said Commissioners shall also prepare in duplicate and file with each Government a joint report describing in detail the work done by them in replacing and repairing lost or damaged monuments and the character and location of the several monuments and boundary marks placed by them along said boundary.

The line so laid down and defined shall be taken and deemed to be the international boundary as

defined and established by treaty provisions and the proceedings thereunder as aforesaid from the northwesternmost point of the Lake of the Woods to the summit of the Rocky Mountains.

## ARTICLE VII.

### The boundary from the summit of the Rocky Mountains to the Gulf of Georgia.

Whereas, by concurrent action of the Government of the United States and the Government of Great Britain in 1902 and 1903, Commissioners were designated to act jointly for the purpose of renewing lost or damaged monuments and placing additional monuments where such were needed throughout the course of the boundary along the forty-ninth parallel of north latitude, from the summit of the Rocky Mountains westward to the eastern shore of the Gulf of Georgia, as defined in Article I of the Treaty of June 15, 1846, between the United States and Great Britain and as marked by monuments along its course and laid down on a series of charts, seven in number, by a Joint Commission organized in 1858 for that purpose and composed of two Commissioners appointed one by each Government, which charts, duly certified and authenticated in duplicate by said Commissioners, were approved and adopted by the two Governments, as appears from the declaration in writing to that effect signed on February 24, 1870, at Washington by duly authorized Plenipotentiaries of the respective Governments, and it appearing that the remonumenting of this line by the Commissioners first above referred to is now approaching completion:

It is hereby agreed by the High Contracting Parties that when such work is completed the entire course of said boundary, showing the location of the boundary monuments and marks established along the course of the boundary, shall be marked upon quadruplicate sets of accurate modern charts prepared or adopted for that purpose, and the said Commissioners, or their successors, are hereby authorized and required to so mark the line and designate the monuments on such charts, two duplicate originals of which shall be filed with each Government, and the said Commissioners, or their successors, shall also prepare in duplicate and file with each Government a joint report describing in detail the work done by them in replacing and repairing lost or damaged monuments and the character and location of the several monuments and boundary marks placed by them along said boundary.

The line so laid down and defined shall be taken and deemed to be the international boundary as defined and established by treaty provisions and the proceedings thereunder as aforesaid, from the summit of the Rocky Mountains to the eastern shore of the Gulf of Georgia.

## ARTICLE VIII.

### The boundary from the forty-ninth parallel to the Pacific Ocean.

The High Contracting Parties agree that each shall appoint, without delay, an expert geographer or

surveyor to serve as Commissioners for the purpose of delineating upon accurate modern charts, prepared or adopted by them for that purpose, the international boundary line between the United States and the Dominion of Canada from the forty-ninth parallel of north latitude along the middle of the channel which separates Vancouver's Island from the mainland and the middle of the Haro Channel and of Fuca's Straits to the Pacific Ocean, as defined in Article I of the Treaty of June 15, 1846, between the United States and Great Britain, and as determined by the award made on October 21, 1872, by the Emperor of Germany as arbitrator pursuant to the provisions of Articles XXXIV-XLII of the Treaty of May 8, 1871, between the United States and Great Britain, and as traced out and marked on a quadruplicate set of charts prepared for that purpose and agreed upon and signed by the duly authorized representatives of the respective Governments, as appears from the protocol of a conference at Washington on March 10, 1873, between such representatives which was signed by them on that date, and as defined by them in a written definition of said boundary signed by them and referred to in and attached to said protocol, and it is agreed that the said Commissioners shall adopt in place of the curved line passing between Saturna Island and Patos Island as shown on said charts a straight line running approximately north and south through a point midway between the eastern point of Saturna Island and the western point of Patos Island and intersecting the prolongations of the two straight lines of the boundary now joined by a curved line. The entire line thus laid down shall consist of a series of connecting straight lines defined by

distances and courses; and the Commissioners are authorized to select and establish such reference marks on shore as they may deem necessary for the proper definition and location on the water of the boundary aforesaid. A quadruplicate set of such charts, showing the lines so laid down and marked by them and the location of the several marks or monuments selected or established by them along its course, shall be signed by them and two duplicate originals thereof shall be filed by them with each Government, and the Commissioners shall also prepare in duplicate and file with each Government a joint report, or reports, describing in detail the course of said line and the boundary marks and their location along its course.

The line so defined and laid down shall be taken and deemed to be the international boundary, as defined and established by treaty provisions and the proceedings thereunder as aforesaid, from the forty-ninth parallel of north latitude along the middle of the channel which separates Vancouver's Island from the mainland and the middle of Haro Channel and of Fuca's Straits to the Pacific Ocean.

## ARTICLE IX.

### General provisions.

The Commissioners appointed under the provisions of this Treaty shall proceed without delay to perform the duties assigned to them, but each Commissioner shall, before entering upon his duties, make oath in writing that he will impartially and faithfully perform his duties as such Commissioner.

In case a vacancy occurs in any of the Commissions constituted by this Treaty, by reason of the death, resignation, or other disability of a Commissioner, before the work of such Commission is completed, the vacancy so caused shall be filled forthwith by the appointment of another Commissioner by the party on whose side the vacancy occurs, and the Commissioner so appointed shall have the same powers and be subject to the same duties and obligations as the Commissioner originally appointed.

If a dispute or difference should arise about the location or demarcation of any portion of the boundary covered by the provisions of this Treaty and an agreement with respect thereto is not reached by the Commissioners charged herein with locating and marking such portion of the line, they shall make a report in writing jointly to both Governments, or severally each to his own Government, setting out fully the questions in dispute and the differences between them, but such Commissioners shall, nevertheless, proceed to carry on and complete as far as possible the work herein assigned to them with respect to the remaining portions of the line.

In case of such a disagreement between the Commissioners, the two Governments shall endeavor to agree upon an adjustment of the questions in dispute, and if an agreement is reached between the two Governments it shall be reduced to writing in the form of a protocol, and shall be communicated to the said Commissioners, who shall proceed to lay down

and mark the boundary in accordance therewith, and as herein provided, but without prejudice to the special provisions contained in Articles I and II regarding arbitration.

It is understood that under the foregoing articles the same persons will be appointed to carry out the delimitation of boundaries in the several sections aforesaid, other than the section covered by Article IV, unless either of the Contracting Powers finds it expedient for some reason which it may think sufficient to appoint some other person to be Commissioner for any one of the above-mentioned sections.

Each Government shall pay the expenses of its own Commissioners and their assistants, and the cost of marking and monumenting the boundary shall be paid in equal moieties by the two Governments.

ARTICLE X.

This Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged in Washington as soon as parcticable.

In faith whereof the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 11th day of April in the year of our Lord one thousand nine hundred and eight.

ELIHU ROOT

[SEAL.]

JAMES BRYCE

[SEAL.]

And whereas the said Convention has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Washington, on the fourth day of June, one thousand nine hundred and eight;

Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this first day of July, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-second.

[SEAL]

THEODORE ROOSEVELT

By the President:

ALVEY A. ADEE

Acting Secretary of State.

# APPENDIX E

## Treaty between the United States and Great Britain in respect of boundary between the United States and Canada.

Signed at Washington, February 24, 1925;
Ratification advised by the Senate, March 12, 1925;
Ratified by the President, April 9, 1925;
Ratified by Great Britain, May 30, 1925;
Ratifications exchanged at Washington, July 17, 1925;
Proclaimed, July 17, 1925.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a treaty between the United States of America and His Britannic Majesty, in respect of Canada, to define more accurately at certain points and to complete the international boundary between the United States and Canada and to maintain the demarcation of that boundary was concluded and signed by their respective Plenipotentiaries at Washington on the twenty-fourth day of February, one thousand nine hundred and twenty-five, the original of which treaty is word for word as follows:

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, desiring to define more accurately at certain

points and to complete the international boundary between the United States and Canada and to maintain the demarcation of that boundary, have resolved to conclude a treaty for these purposes, and to that end have appointed as their respective plenipotentiaries:

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States; and

His Britannic Majesty, in respect of the Dominion of Canada: The Honorable Ernest Lapointe, K. C., a member of His Majesty's Privy Council for Canada and Minister of Justice in the Government of that Dominion;

Who, after having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

ARTICLE I.

Whereas Article V of the Treaty concerning the boundary between the United States and the Dominion of Canada concluded on April 11, 1908, between the United States and Great Britain, provided for the survey and demarcation of the international boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River, at the western shore of Lake Superior, to the northwesternmost point of Lake of the Woods, as defined by the treaties concluded between the United States and Great Britain on

September 3, 1783, and August 9, 1842;

And whereas Article VI of the said Treaty concluded on April 11, 1908, provided for the relocation and repair of lost or damaged monuments and for the establishment of additional monuments and boundary marks along the course of the international boundary between the United States and the Dominion of Canada from the north westernmost point of Lake of the Woods to the summit of the Rocky Mountains, as established under existing treaties and surveyed, charted, and monumented by the Joint Commission appointed for that purpose by joint action of the Contracting Parties in 1872;

And whereas it has been found by surveys executed under the direction of the Commissioners appointed pursuant to the said Treaty of April 11, 1908, that the boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River, at the western shore of Lake Superior, to the northwesternmost point of Lake of the Woods as defined by the treaties concluded on September 3, 1783, and August 9, 1842, is intersected by the boundary from the northwesternmost point of the Lake of the Woods to the summit of the Rocky Mountains as established under existing treaties and surveyed, charted, and monumented by the Joint Commission appointed for that purpose in 1872, at five points in Lake of the Woods adjacent to and directly south of the said north westernmost point, and that there are two small areas of United States waters in Lake of the Woods, comprising a total area of two and one-half acres, entirely surrounded by

Canadian waters;

And whereas no permanent monuments were ever erected on these boundary lines north of the most southerly of these points of intersection;

The Contracting Parties, in order to provide for a more practical definition of the boundary between the United States and the Dominion of Canada in Lake of the Woods, hereby agree that this most southerly point of intersection, being in latitude 49° 23' 04" .49 north, and longitude 95° 09' 11".61 west, shall be the terminus of the boundary line heretofore referred to as the international boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River, at the western shore of Lake Superior, to the northwesternmost point of Lake of the Woods and the initial point of the boundary line heretofore referred to as the international boundary between the United States and the Dominion of Canada from the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains, in lieu of the said northwesternmost point.

The aforesaid most southerly point shall be located and monumented by the Commissioners appointed under the said Treaty of April 11, 1908, and shall be marked by them on the chart or charts prepared in accordance with the provisions of Articles V and VI of the said Treaty, and a detailed account of the work done by the Commissioners in locating said point, together with a description of the character and location of the several monuments erected, shall be included in the report or reports prepared pursuant

to the said Articles.

The point so defined and monumented shall be taken and deemed to be the terminus of the boundary line heretofore referred to as the international boundary line between the United States and the Dominion of Canada, from the mouth of Pigeon River, at the western shore of Lake Superior, to the northwesternmost point of Lake of the Woods and the initial point of the boundary line heretofore referred to as the international boundary between the United States and the Dominion of Canada from the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains.

ARTICLE II.

Whereas Article VI of the Treaty concerning the boundary between the United States and the Dominion of Canada concluded on April 11, 1908, between the United States and Great Britain, provided for the relocation and repair of lost or damaged monuments and for the establishment of additional monuments and boundary marks along the courses of the international boundary between the United States and the Dominion of Canada from the northwesternmost point of Lake of the Woods south to the 49th parallel of north latitude and thence westward along said parallel of latitude to the summit of the Rocky Mountains, as established under existing treaties and surveyed, charted, and monumented by the Joint Commission appointed for that purpose by joint action of the Contracting Parties in 1872;

And whereas Article VI of the said Treaty concluded on April 11, 1908, further provides that in carrying out the provisions of that article the agreement stated in the protocol of the final meeting of the said Joint Commission, dated May 29, 1876, should be observed, by which protocol it was agreed that in the intervals between the monuments along the 49th parallel of north latitude the boundary line has the curvature of a parallel of 49° north latitude;

And whereas the Commissioners appointed and acting under the provisions of Article VI of the said Treaty of 1908 have marked the boundary line wherever necessary in the intervals between the original monuments established by the said Joint Commission, appointed in 1872, in accordance with the agreement stated in the Protocol of the final meeting, dated May 29, 1876, of the Joint Commission aforesaid, and as set forth in Article VI of the Treaty of 1908, by placing intermediate monuments on lines joining the original monuments, which have in each case the curvature of a parallel of 49° north latitude;

And whereas the average distance between adjacent monuments as thus established or reestablished along the 49th parallel of north latitude from Lake of the Woods to the summit of the Rocky Mountains by the Commissioners acting under Article VI of the Treaty of 1908 is one and one-third miles and therefore the deviation of the curve of the 49th parallel from a straight or right line joining adjacent monuments is, for this average distance between monuments, only one-third of a foot, and in no case does the actual deviation exceed one and

eight-tenths feet;

And whereas it is impracticable to determine the course of a line having the curvature of a parallel of 49° north latitude on the ground between the adjacent monuments which have been established or reestablished by the Commissioners and the demarcation of the boundary would be more thoroughly effective if the line between adjacent monuments be defined as a straight or right line;

And whereas it is desirable that the boundary at any point between adjacent monuments may be conveniently ascertainable on the ground, the Contracting Parties, in order to complete and render thoroughly effective the demarcation of the boundary between the United States and the Dominion of Canada from the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains, hereby agree that the line heretofore referred to as the international boundary between the United States and the Dominion of Canada from the northwesternmost point of Lake of the Woods to the summit of the Rocky Mountains shall be defined as consisting of a series of right or straight lines joining adjacent monuments as now established or reestablished and as now laid down on charts by the Commissioners acting under Article VI of the Treaty of 1908, in lieu of the definition set forth in the agreement of the aforesaid Joint Commissioners, dated May 29, 1876, and quoted in Article VI of the said Treaty of 1908, that in the intervals between the monuments the line has the curvature of the parallel of 49° north latitude.

## ARTICLE III.

Whereas the Treaty concluded on May 21, 1910, between the United States and Great Britain, defined the international boundary line between the United States and the Dominion of Canada from a point in Passamaquoddy Bay lying between Treat Island and Friar Head to the middle of Grand Manan Channel and provided that the location of the line so defined should be laid down and marked by the Commissioners appointed under the Treaty of April 11, 1908;

And whereas it has been found by the surveys executed pursuant to the said Treaty of May 21, 1910, that the terminus of the boundary line defined by said Treaty at the middle of Grand Manan Channel is less than three nautical miles distant both from the shore line of Grand Manan Island in the Dominion of Canada and from the shore line of the State of Maine in the United States, and that there is a small zone of waters of controvertible jurisdiction in Grand Manan Channel between said terminus and the High Seas;

The Contracting Parties, in order completely to define the boundary line between the United States and the Dominion of Canada in the Grand Manan Channel, hereby agree that an additional course shall be extended from the terminus of the boundary line defined by the said Treaty of May 21, 1910, south 34° 42' west, for a distance of two thousand three hundred eighty-three (2,383) meters, through the middle of Grand Manan Channel, to the High Seas.

The course so defined shall be located and marked by the Commissioners appointed under the Treaty of April 11, 1908, and shall be laid down by them on the chart or charts adopted in accordance with the provisions of Article I of the said Treaty, and a detailed account of the work done by the Commissioners in locating and marking said line, together with a description of the several monuments erected, shall be included in the report or reports prepared pursuant to Article I of the Treaty of April 11, 1908.

The course so defined and laid down shall be taken and deemed to be the boundary line between the United States and the Dominion of Canada in Grand Manan Channel from the terminus of the boundary line as defined by the Treaty of May 21, 1910, to the High Seas.

ARTICLE IV.

Whereas, pursuant to existing treaties between the United States and Great Britain, a survey and effective demarcation of the boundary line between the United States and the Dominion of Canada through the Great Lakes and the St. Lawrence River and through the Straits of Georgia, Haro, and Juan de Fuca from the 49th Parallel to the Pacific Ocean and between Alaska and the Dominion of Canada from the Arctic Ocean to Mount St. Elias have been made and the signed joint maps and reports in respect thereto have been filed with the two governments;

And whereas a survey and effective demarcation of the boundary line between the United States and the Dominion of Canada from the Gulf of Georgia to Lake Superior and from the St. Lawrence River to the Atlantic Ocean and between Alaska and the Dominion of Canada from Mount St. Elias to Cape Muzon are nearing completion;

And whereas boundary monuments deteriorate and at times are destroyed or damaged; and boundary vistas become closed by the growth of timber;

And whereas changing conditions require from time to time that the boundary be marked more precisely and plainly by the establishment of additional monuments or the relocation of existing monuments;

The Contracting Parties, in order to provide for the maintenance of an effective boundary line between the United States and the Dominion of Canada and between Alaska and the Dominion of Canada, as established or to be established, and for the determination of the location of any point thereof, which may become necessary in the settlement of any question that may arise between the two governments hereby agree that the Commissioners appointed under the provisions of the Treaty of April 11, 1908, are hereby jointly empowered and directed: to inspect the various sections of the boundary line between the United States and the Dominion of Canada and between Alaska and the Dominion of Canada at such times as they shall deem necessary; to repair all damaged monuments and buoys; to relocate and rebuild monuments which have been destroyed; to keep the boundary vistas open; to move

boundary monuments to new sites and establish such additional monuments and buoys as they shall deem desirable; to maintain at all times an effective boundary line between the United States and the Dominion of Canada and between Alaska and the Dominion of Canada, as defined by the present treaty and treaties heretofore concluded, or hereafter to be concluded; and to determine the location of any point of the boundary line which may become necessary in the settlement of any question that may arise between the two governments.

The said Commissioners shall submit to their respective governments from time to time, at least once in every calendar year, a joint report containing a statement of the inspections made, the monuments and buoys repaired, relocated, rebuilt, moved, and established, and the mileage and location of vistas opened, and shall submit with their reports, plats and tables certified and signed by the Commissioners, giving the locations and geodetic positions of all monuments moved and all additional monuments established within the year, and such other information as may be necessary to keep the boundary maps and records accurately revised.

After the completion of the survey and demarcation of the boundary line between the United States and the Dominion of Canada from the Gulf of Georgia to Lake Superior and from the St. Lawrence River to the Atlantic Ocean, as provided for by the Treaty of April 11, 1908, the Commissioners appointed under the provisions of that Treaty shall continue to carry out the provisions of this Article, and, upon the death, resignation, or other disability of either of

them, the Party on whose side the vacancy occurs shall appoint an Expert Geographer or Surveyor as Commissioner, who shall have the same powers and duties in respect to carrying out the provisions of this Article, as are conferred by this Article upon the Commissioner appointed under the provisions of the said Treaty of 1908.

The Contracting Parties further agree that each government shall pay the salaries and expenses of its own commissioner and his assistants, and that the expenses jointly incurred by the Commissioners in maintaining the demarcation of the boundary line in accordance with the provisions of this Article shall be borne equally by the two Governments.

ARTICLE V.

This treaty shall be ratified by the Contracting Parties and the ratifications shall be exchanged in Washington or Ottawa as soon as practicable. The treaty shall take effect on the date of the exchange of ratifications.

Upon the expiration of six years from the date of the exchange of ratifications of the present treaty, or any time thereafter, Article IV may be terminated upon twelve months' written notice given by either Contracting Party to the other, and following such termination the Commissioners therein mentioned and their successors shall cease to perform the functions thereby prescribed.

In faith whereof, the respective Plenipotentiaries have signed this treaty in duplicate and have

hereunto affixed their seals.

Done at Washington the 24th day of February, A. D. 1925.

CHARLES EVANS HUGHES

[SEAL]

ERNEST LAPOINTE

[SEAL]

AND WHEREAS the said treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the city of Washington on the seventeenth day of July, one thousand nine hundred and twenty-five;

NOW, THEREFORE, be it known that I, Calvin Coolidge, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington, this seventeenth day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

CALVIN COOLIDGE

[SEAL]

By the President:

FRANK B KELLOGG

Secretary of State.

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